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WILLS

BY

THOMAS JARMAN, ESQ.

The Seventh Edition

BY

CHARLES PERCY SANGER,

OF LINCOLN'S INN, BARRISTER-AT-LAW,

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PREFACE

TO THE SEVENTH EDITION.

When this book was first published, the Wills Act, 1837, which made far-reaching changes in the law of wills, had only been in operation for a few years. In the course of time the law prior to that Act (which Mr. Jarman refers to as the old law) has become nearly, though not completely, obsolete. For three-quarters of a century after Mr. Jarman wrote there were no very great changes in the law, but the relative importance of various subjects had changed. Mr. Jarman, who had previously edited Powell on Devises, was primarily interested in problems connected with real property and he regarded gifts of personalty as of minor importance. But gradually testators lost the habit of setting puzzles for the Courts to unravel in connection with complicated devises of land, and from the growing importance of personal property, accentuated by the widespread formation of companies, the earlier treatment of the various topics became disproportionate. At the beginning of this century the late Mr. Charles Sweet undertook a thorough revision of the book. Chapters were added, chapters were rewritten, and Mr. Jarman's original words were distinguished by quotation marks from the additions made by his editors. This method was important for two reasons. Mr. Jarman had a peculiar gift for summing up the results of the cases in accurate and felicitous terms, and his words can be quoted as authoritative in the Courts (see "What an Old Reporter Told Me" by Professor Kenny, 43 Law Quarterly Review, at p. 491).

In this edition I have only added one chapter—that on Income Tax and Death Duties, a subject which has become prominent owing to the present heavy rate of taxation; but in order not to alter the numbering of the chapters I have added the chapter on Estates of Trustees to that on Estates in Fee.

The alterations in the law which have been made by a series of Acts which came into force on January 1, 1926, are even more profound, so far as the construction of wills is concerned, than those made by the Wills Act; so that in that respect we have to face much the same position as confronted Mr. Jarman when first he wrote. But the task is now far more difficult; because the Wills Act only affected wills, whereas a good deal of the law of wills has been incidentally altered apart altogether from the few sections in the recent Acts which deal expressly with wills. One alteration—that enabling a tenant in tail in possession to dispose of the property as if he had barred the entail—only affects wills *made* after 1925; the fact that now the only legal estates in land are a fee simple or a term of years absolute affects wills whether or not coming into operation after 1925. But the alterations in the rules of construction or law, *e.g.*, the abolition of the rule in *Shelley's Case*, only affect wills which come into operation after 1925, so that in determining questions on the construction of a will the date of the testator's death must always be borne in mind.

It may here be convenient to mention shortly some of the chief alterations which the recent legislation has effected. The rule in *Whitby* v. *Mitchell* (Chap. X) is abolished and there is some alteration in the law relating to perpetuities. Since the heir-at-law is abolished there will be no resulting trust for the heir (Chap. XXI) and in course of time the Courts will be seldom troubled with the doctrine of conversion (Chap. XXII). There can be no tenancy in common of land at law (Chap. XLIV). Trustees will always take a fee simple or a term of years absolute, so that sections 30 and 31 of the Wills Act (Chap. XLV) will not be required. Estates tail will

only be created by formal words, so that much of Chap. XLVII and Chaps. XLVIII, XLIX, LI (which deal with the rule in *Shelley's Case*) will become out of date. The fact that realty and personalty are now put on the same footing as regards liability to debts alters the rules for administration of estates (Chaps. LIII and LIV). For example, a problem which had formerly to be solved would turn upon the question: Is the realty charged after the personalty is exhausted, or *pari passu* with the personalty, or in exoneration of the personalty? In wills coming into operation after 1925 the corresponding problem will turn upon the question: Is the personalty primarily liable, or is the realty primarily liable? There are many other alterations which I have in this edition tried to indicate, but some of which, I fear, I may have overlooked. It must be remembered that although the principle of the new legislation is to assimilate the law of real and personal property (*e.g.*, by permitting personalty to be entailed), the assimilation is by no means complete, but it may be hoped that so far as wills are concerned the course of the decisions will tend in favour of assimilation.

There is one rule of construction which although built up by a series of decisions, undoubtedly in many cases defeats the intention of testators. It is quite common to use the word "money" in the sense of "property." If a testator says: "I have left my money to A," he certainly does not mean that he has left him only the cash in the house or at the bank; but starting from *Lowe* v. *Thomas*, where it was clear from the will in that case that money could not have the meaning of property, the decisions have established the rule that a gift of "all my money" without any controlling context only passes cash (*Re Gates*).

Although the principle of the Wills Act was that no person under twenty-one (unless on military service) could make a will, there are many ways in which a person over sixteen can in effect make a testamentary disposition

of large sums of money under the P.O. Savings Bank Acts and various other Acts mentioned at pp. 38 and 39 of this edition; so that a young man of sixteen can make what is really a testamentary disposition of hundreds of pounds, although he cannot make any bequest of his bicycle, books, or other personal belongings. Such articles have consequently to be held in trust for sale and the proceeds distributed amongst his statutory next-of-kin. It is extremely difficult to understand the policy of the Legislature in this respect.

The law of charitable bequests still remains in a most unsatisfactory state, and it cannot be fully treated in a single chapter.

I am grateful to many members of both branches of the profession, and in particular to my friends, Mr. H. G. Carter, Mr. G. H. J. Hurst and Mr. A. H. Withers, for criticism and help. To my learned friend, Miss Cooper Willis, I am very greatly indebted for her valuable and untiring assistance. To her industry the Table of Cases and the Index are due.

By omitting from the book a great deal of antiquated learning I have gained space for the necessary new matter without increasing the size of the work, but as the two volumes of the last edition were found inconveniently large, it has been considered advisable that this edition should be issued in three.

C. P. S.

LINCOLN'S INN,
October, 1929.

PREFACE

TO THE FIRST EDITION.

SIXTEEN years have now elapsed since the writer diffidently presented to the profession his first publication on Testamentary Law, in the form of an edition of Powell on Devises, with a supplementary treatise on the Construction of Devises. The reception given to this work was such as abundantly to compensate for the severe labour which it exacted, and under which the health of its Editor more than once sank. This was followed, after the interval of a few years, by the Tenth Volume of the Precedents in Conveyancing, being the portion of that work which was devoted to the same subject. The materials afforded by these publications have been freely used in the present work; but considering the very large accessions since made to the adjudications on testamentary law, and that it has not escaped the activity of modern legislation, it will be obvious that many of the various subjects embraced by so extensive a range of disquisition, now present themselves under a different aspect, requiring, not only very large additions to the matter which composed the former works, but the rejection of no inconsiderable portion of that matter; and the Writer is not ashamed to avow, that another, though certainly a less extensive, head of alteration arises from the changes which experience has wrought in some of the opinions of his earlier days. The result is, that probably more than one-half of the present treatise is entirely original; and the writer therefore feels that he has to subject his performance (as partially new) to the criticism of his professional brethren, whose kind consideration he again bespeaks, convinced that those who are the most competent to detect error, will be the most generous and indulgent in the appreciation of the difficulties which beset

the inquirer into the principles of one of the most intricate branches of the law. To those difficulties have been added the daily interruptions of professional avocation, which have long delayed, and have sometimes threatened wholly to prevent, the present publication. The recent act has created some additional embarrassment to a writer on Wills, by introducting new principles of construction, partial in their application; for, by drawing a line between wills of an earlier and those of a later date, the legislature has diminished the importance, without permitting the rejection or the neglect, of the old law. On these subjects, conciseness and compression have been specially aimed at, and some additional labour has been willingly incurred, in order to avoid incumbering the present work unnecessarily with matter, which every passing day tends to render less practically useful.

THOMAS JARMAN.

New Square, Lincoln's Inn,
December, 1843.

NOTE.

The reported decisions up to October, 1929, are included in this edition, but a few of the cases decided since then have been inserted.

Since the references to the Companies (Consolidation) Act, 1908, and the Post Office Savings Banks Acts were printed, the Companies Act, 1929, and the Savings Banks Act, 1929, have come into force.

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THE LAW

WITH RESPECT TO

WILLS.

CHAPTER I.

BY WHAT LOCAL LAW WILLS ARE REGULATED.

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I.—Distinction between Immoveable and Moveable Property.—Mr. Jarman states the general rule thus (*a*): "A will of fixed or immoveable property is generally governed by the *lex loci rei sitæ*; and hence, the place where such a will happens to be made and the language in which it is written, are wholly unimportant, as affecting both its construction and the ceremonial of its execution; the locality of the devised property is alone to be considered. Thus, a will made in Holland and written in Dutch must, in order to operate on lands in England, contain expressions which, being translated into our language, would comprise and destine the lands in question, and must be executed and attested in precisely the same manner as if the will were made in England (*b*). And,

Realty ruled by *lex loci rei sitæ*.

(*a*) First edition, p. 1. It is hardly necessary to point out that the rule only applies so far as the will attempts to dispose of immoveable property; so far as it disposes of personal property, its operation and construction depend on a different rule: *post*, p. 5.

(*b*) *Bovey* v. *Smith*, 1 Vern. 85. See also *Bowaman* v. *Reeve*, Pre. Ch. 577; *Drummond* v. *Drummond*, 6 Br. P. C. Toml. 601; *Coppin* v. *Coppin*, 2 P W. 291; *Brodie* v. *Barry*, 2 V. & B. 131. To arrive at the intention of such a will, the technical terms of foreign law will be read in the sense which that law gives them, and will operate accordingly so far as the *lex loci* permits: *Studd* v. *Cook*, 8 A. C. 577; *Re Harman*, [1894] 3 Ch. 607; but expressions which have a technical meaning according to the *lex loci* are given effect to: *Re Miller*, [1914] 1 Ch. 511.

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of course, lands in England belonging to a British subject domiciled abroad, who dies intestate, descend according to the English law" (*c*).

Intestacy.

"When a conflict of laws arises on the death of an intestate, the devolution of his immoveables is governed by the *lex situs*; the devolution of his moveables is governed by the *lex domicilii*. . . . Whether particular property is a moveable or an immoveable is decided according to the *lex situs*" (*d*). Thus, when a person domiciled in a foreign country dies intestate leaving an interest in the proceeds of sale of English freeholds, which are subject to a trust for sale but not yet sold, such an interest is an immoveable and the succession thereto is governed by the *lex situs* (*d*).

Power of appointment.

The principle applies to a will made in exercise of a power to appoint immoveable property (*e*).

Devise invalid by *lex loci*.

A disposition of immoveable property situate in England which is invalid by the law of England, is not made valid by the fact that it is permitted by the law of the testator's domicil. Thus, the invalidity of a devise of English realty under the Mortmain Acts is not affected by the testator's domicil (*f*).

Foreign land.

Conversely, land situate abroad is subject to the local law, and any disposition of it by the will of a domiciled Englishman is subject to that law (*g*).

Mortgage.

A mortgage on land is an immoveable, therefore when a domiciled Englishman, who died before the repeal of the Mortmain Act, 1736, which applied to Ontario, gave his residuary estate, which included mortgages on land in Ontario, to charity, the gift of the mortgages was void (*h*).

Administration.

If a testator, domiciled abroad, makes a will by which real estate situate in England is vested in his executors, it is subject to the law of administration (as regards payment of debts, annuities, etc.) which prevails in the country of his domicil (*i*).

(*c*) See *Doe* d. *Birtwhistle* v. *Vardill*, 5 B. & Cr. 438; *Birtwhistle* v. *Vardill*, 7 Cl. & F. 895, where it was held that a child who was legitimate by the law of his parents' domicil, but illegitimate according to English law, could not take land in England by descent. See now sections 3 and 8 of the Legitimacy Act, 1926. As to land in Italy, see *Earl Nelson* v. *Earl Bridport*, 8 Bea. 547. Our Courts will not entertain disputes regarding the devolution of title to immoveable property situate in a foreign country: *Re Hawthorne*, 23 Ch. D. 743. As to the exceptions to this rule, see *Deschamps* v. *Miller*, [1908] 1 Ch. 856. And as to the jurisdiction of English Courts over land abroad, see *British South Africa Co.* v. *Comp. de Moçambique*, [1893] A. C. 602.

(*d*) *Re Berchtold*, [1923] 1 Ch. 192, at p. 199. See a note in the third edition of this work cited in argument in *Freke* v. *Lord Carbery*, L. R. 16 Eq. 461, at p. 493.

(*e*) *Murray* v. *Champernowne*, [1901] 2 Ir. R. 232. See *post*, p. 776.

(*f*) *Duncan* v. *Lawson*, 41 Ch. D. 394.

(*g*) See *Re Piercy*, [1895] 1 Ch. 83; *Re Rea*, [1902] 1 Ir. R. 451.

(*h*) *Re Hoyles*, [1910] 2 Ch. 333.

(*i*) *Re Hewit*, [1891] 3 Ch. 568. See the cases cited *post*, p. 10, n. (*s*).

Scotland, Ireland, etc.

It will, of course, be remembered that so far as questions of domicil and locality are concerned, Scotland, Ireland and the British Dominions and Colonies are foreign countries (*j*).

Leaseholds governed by *lex loci*.

Leaseholds for years are for many purposes included under the denomination of immoveable property (*k*), so as to be governed by the *lex loci* and not by the *lex domicilii*. Thus, if a testator, domiciled abroad, disposes of leaseholds situate in England upon trusts which contravene the provisions of the Thellusson Act, these trusts are void (*l*). So if a person who owns leaseholds in England is domiciled abroad, the beneficial interest in them does not pass by his will unless it is executed in accordance with the requirements of the Wills Act (*m*). Conversely, if the will is executed in accordance with English law, but not in accordance with the law of the domicil, it is valid as to the testator's English leaseholds, although it may be invalid as to the remainder of his personal estate (*n*). And if a person domiciled in England bequeaths his residuary personalty to persons in succession, leaseholds situate abroad forming part of the residue are subject to the *lex loci*, and if by that law the tenant for life is entitled to enjoy them in specie, they ought not to be converted under the rule in *Howe* v. *Earl of Dartmouth* (*o*).

Lord Kingsdown's Act.

But leaseholds are "personal estate" within the meaning of Lord Kingsdown's Act, subject, of course, to the general principle recognised in *Freke* v. *Lord Carbery* (*p*).

Estates *pur auter vie*.

Estates *pur auter vie* are realty (*q*), and are, therefore, presumably immoveable property within the meaning of the rule now under discussion.

Doctrine of conversion.

Money representing the proceeds of sale of land in England, sold by order of the Court under the Partition Acts, is considered as real estate (*r*). Where the testator has an absolute power of disposition, so that he can alter the nature of the property, it would seem, on principle, that if he directs land to be turned into money, he can dispose of the money in any manner authorised by the law of his domicil (*s*).

(*j*) See *Re Johnson*, [1903] 1 Ch. 821; *Re Rea*, [1902] 1 Ir. R. 451.

(*k*) As to leaseholds situate in a British colony, see *Re Clinton*, 88 L. T. 17 (where, however, the point was not decided); *Re Moses*, [1908] 2 Ch. 235.

(*l*) *Freke* v. *Lord Carbery*, L. R. 16 Eq. 461. See *In b. Gentili*, Ir. R. 9 Eq. 541; *Duncan* v. *Lawson*, 41 Ch. D. 394 (intestacy).

(*m*) *Pepin* v. *Bruyère*, [1900] 2 Ch. 504; [1902] 1 Ch. 24.

(*n*) *De Fogassieras* v. *Duport*, 11 L. R. Ir. 123. See *Re Earl of Caithness*, 7 T. L. R. 354.

(*o*) *Re Moses*, [1908] 2 Ch. 235. The rule in *Howe* v. *Earl of Dartmouth*, 7 Ves. 137, is discussed in Chap. XXXIV, *post*, p. 1207.

(*p*) *Re Grassi*, [1905] 1 Ch. 584, *post*, p. 13.

(*q*) *Chatfield* v. *Berchtoldt*, L. R. 7 Ch. 192.

(*r*) *Grimwood* v. *Bartels*, 46 L. J. Ch. 788. See *Re Hawthorne*, 23 Ch. D. 743.

(*s*) *Re Piercy*, [1895] 1 Ch. 83; *Re Harman*, [1894] 3 Ch. 607. See

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Freke v. *Lord Carbery.*

In *Freke* v. *Lord Carbery* (*t*), however, where a testator domiciled in Ireland bequeathed English leaseholds to trustees upon trust for sale and investment, and directed the investments to be held upon trust to accumulate the income for a period in excess of that allowed by the Thellusson Act, it was held by Lord Selborne that the Act applied, and that the trust for accumulation was therefore partly invalid. *Sed quære* (*u*). If a testator domiciled in England devises immoveable property situate abroad to trustees in England upon trust for sale, and a beneficiary dies while the property is still unsold, his interest is liable to English death duties (*x*).

Trust to purchase land.

It follows from the principle above stated, that if a testator bequeaths personal estate to trustees upon trust to invest it in the purchase of land in a foreign country, to be settled to limitations permitted by the law of that country, the fact that they are illegal by the law of England is immaterial (*y*).

Conversely, if a testator domiciled abroad bequeaths money to an English corporation, to be laid out in the purchase of land in England, the validity of the bequest is not affected by the fact that such a bequest would have been illegal according to the law of England (*z*).

Choses in action.

Choses in action are an anomalous description of property. For some purposes they have a locality and for others they have not (*a*). So far as the law of wills is concerned, questions with regard to choses in action arise chiefly in connection with gifts of property in a particular place (*b*), and with reference to the administration of assets (*c*). The rules with regard to appointments under powers also appear to be based on the principle that a trust fund has a locality, and that a testamentary appointment

Trust funds.

Gillies v. *Longlands*, 4 De G. & S. 372; *Chandler* v. *Pocock*, 15 Ch. D. 491; 16 Ch. D. 648, and the other cases cited in the chapter on Powers.

(*t*) L. R., 16 Eq. 461.

(*u*) It does not appear whether the decision turned on the fact that, although the testator was domiciled in Ireland, the trust was (as appears to have been the case) one to be administered according to English law (see *Cookney* v. *Anderson*, 31 Bea. 452; *Ewing* v. *Orr-Ewing*, 10 App. Ca. 453, and other cases cited in Lewin on Trusts (12th ed.), p. 50).

(*x*) *Att.-Gen.* v. *Johnson*, [1907] 2 K. B. 885.

(*y*) *Fordyce* v. *Bridges*, 2 Ph. 497.

(*z*) *Canterbury (Mayor, etc., of)* v. *Wyburn*, [1895] A. C. 89. It appears that if the testator had paid the money to the corporation in his lifetime, they could have complied with the condition.

(*a*) See the decisions on section 59 of the Stamp Act, 1891, especially *Smelting Co.* v. *Commrs. I. R.*, [1897] 1 Q. B. 175; *West London Syndicate* v. *Commrs. I. R.*, [1898] 2 Q. B. 507; *Commrs. I. R.* v. *Muller*, [1901] A. C. 217; *Danubian Sugar Factories* v. *Commrs. I. R.*, [1901] 1 K. B. 245; *Velasquez, Ltd.* v. *Commrs. I. R.*, [1914] 3 K. B. 458. See also *Re Queensland Mercantile Co.*, [1892] 1 Ch. 219; *Kelly* v. *Selwyn*, [1905] 2 Ch. 117.

(*b*) *Post*, p. 70 and p. 1046.

(*c*) *Post*, Chap. LIV; *Re Clark*, [1904] 1 Ch. 294.

is therefore not necessarily governed by the law of the testator's domicil (*d*).

Moveable property.

The general rule, as stated by Mr. Jarman (*e*), is that "in regard to personal, or rather moveable property, the *lex domicilii* prevails (*f*). If, therefore, a foreigner dies domiciled in England, his personal property, in case he were intestate, will be distributed according to the English law of succession (*g*); and any will which he may have left, whether made in his native or in his adopted country, or elsewhere, must be construed according to the law of England (*h*); and it is scarcely necessary to observe that stock in the public funds is undistinguishable in this respect from other personal property (*i*). And the moveable property of such a person which is out of England at the time of his death, will also, it seems, generally speaking, follow the domicil; but this, of course, depends on the laws of the State in which the property is situate, which may not (though the codes of many civilised States do (*k*)) accord with our own in this particular. Sometimes, however, a difficulty occurs in the application of the principle, from the fact that the foreign State, though it recog-

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(*d*) See *post*, p. 9 and p. 776.

(*e*) First edition, p. 2. It should be remembered that such expressions as "the lex domicilii" or "the law of England" are ambiguous; the question (which does not properly fall within the scope of this work) is discussed in Dicey, Confl. of Laws, 79. It is hardly necessary to say that in Roman law *lex domicilii* had not the meaning which we attribute to it: see Savigny, System, viii, § 356.

(*f*) *Preston* v. *Melville*, 8 Cl. & F. 1. In *Lynch* v. *Provisional Government of Paraguay*, L. R. 2 P. & D. 268, it was held that a change in the law of the domicil, in the nature of a privilegium, made after the death of the testator, did not affect the jurisdiction of the English Court of Probate. As to the assignment of a debt, see *Republica de Guatemala* v. *Nunez*, [1927] 1 K. B. 669.

(*g*) *Thorne* v. *Watkins*, 2 Ves. Sen. 35; *Bempde* v. *Johnstone*, 3 Ves. 198; *Balfour* v. *Scott*, 6 Br. P. C. 550. As to the question whether the next-of-kin of a foreigner domiciled in England can include persons who would be illegitimate by English law, see *Re Goodman's Trusts*, 17 Ch. D. 266; *Re Grove*, 40 Ch. D. 216.

(*h*) *Anstruther* v. *Chalmer*, 2 Sim. 1; *Price* v. *Dewhurst*, 8 Sim. 299; 4 My. & Cr. 76; *Spratt* v. *Harris*, 4 Hagg. 405; *Reynolds* v. *Kortwright*, 18 Bea. 417. As to *Boyes* v. *Bedale*, 1 H. & M. 798, see *post*, p. 1724.

(*i*) *Re Ewin*, 1 Cr. & J. 151. In this case the question was as to the liability of property to legacy duty, the discussion of which sometimes indirectly involves points as to domicil, alienage, etc. In some editions of this work the effect of domicil on questions of legacy, probate, and succession duty was treated of at some length, but as these questions do not belong to the subject of this treatise, and would demand considerable space for their adequate discussion, the notes have been omitted in this edition.

(*k*) See *Price* v. *Dewhurst*, 4 My. & Cr. 83. Mr. Jarman seems to have been under a misapprehension on this point: many foreign countries treat nationality, and not domicil, as determining the law of succession and testamentary disposition; for example, the law of France (*Re Trufort*, 36 Ch. D. 600), the law of Belgium (*Collier* v. *Rivaz*, 2 Curt. 855), the Italian code (Dicey, 721), and the law of Baden (*Re Johnson*, [1903] 1 Ch. 821). The law of Portugal seems to agree with that of England in this respect: see *Doglioni* v. *Crispin*, L. R. 1 H. L. 301.

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nises the general doctrine, yet imposes restrictions on the testamentary power unknown to the law of the adopted country, and from which it may not permit its citizens to escape, in regard to property within its jurisdiction, by a mere change of domicil. For instance, the French law does not, like our own, permit a man to bequeath his entire property away from his wife and children (*l*). Now, if a Frenchman dies domiciled in England, is it quite clear that his moveable property in France would be subject to British law, so as to pass by such a will? In such cases the Code Napoleon seems to draw a distinction between the acquisition of a foreign domicil by mere residence, and some other more decided acts of self-expatriation, such as that of becoming the naturalised subject of another State" (*m*).

Extent of rule.

The general rule governs questions as to the validity of the will, with regard to the testamentary capacity of the testator (*n*), the bequeathable quality of the property bequeathed by it (*o*), and the formalities with which it was executed (*p*), as well as its construction (*q*).

Law of foreign domicil.

The testamentary capacity of a foreign subject domiciled in England may be affected by a contract or other act entered into by him according to the law of his native country. Thus in *De Nicols* v. *Curlier* (*r*), two French subjects married in France subject to the law of community of goods; they came to England and acquired an English domicil; the husband died, having made an English will disposing of all his property: it was held that as to his moveables the rights of the wife were not affected by the change of domicil, and that she was entitled to the same share as she would have been entitled to if they had remained domiciled in France.

Effect of change of domicil.

A change of domicil may enlarge testamentary capacity. Thus where a Dutch woman domiciled in Holland made a will appointing her husband her heir, and by Dutch law she could only dispose of one-fourth of her estate, on her acquiring an English domicil before her death she could dispose of all her property, and her husband took the whole residue instead of one-fourth of it (*s*).

(*l*) *Vide post*, p. 9, n. (*k*).

(*m*) Liv. 1, tit. 1, chap. 2, s. 17. See *Hamilton* v. *Dallas*, 1 Ch. D. 257; and compare the cases of *De Nicols* v. *Curlier*, [1900] A. C. 21, and *Re Johnson*, [1903] 1 Ch. 821.

(*n*) *Price* v. *Dewhurst*, 4 My. & Cr. 76.

(*o*) *Kilpatrick* v. *Kilpatrick*, 6 Br. P. C. 584.

(*p*) *Robins* v. *Dolphin*, 1 Sw. & Tr. 37; *Dolphin* v. *Robins*, 7 H. L. C. 390; *Countess Ferraris* v. *M. of Hertford*, 3 Curt. 468; *Croker* v. *M. of Hertford*, 4 Moo. P. C. C. 339.

(*q*) See cases cited in n. (*h*), p. 5.

(*r*) [1900] A. C. 21, distinguishing *Lashley* v. *Hog*, 4 Paton, 581.

(*s*) *Re Groos*, [1915] 1 Ch. 572.

Foreign domicil.

The general principle above stated applies in the case of a foreign domicil. If, therefore, any person, whether a British subject or a foreigner, dies while domiciled abroad, the law of the place which at his death constituted his home will regulate the distribution of his moveable (*t*) property in England, in case of intestacy (*u*), *i.e.*, should he happen to have left no instrument which, according to the law of his adopted country, would amount to a testamentary disposition of such property (*x*); and if he left a will, the same law will determine its validity with reference to the formalities of its execution (*y*), the personal competence of the testator (*z*) and the efficacy of his testamentary dispositions (*a*), and will also regulate their construction (*b*).

Thus where a testator domiciled in France makes a will in English form disposing of personalty, it is construed by French law (*c*).

Probate of foreign will.

An English Court will, therefore, not grant probate of such a will (except in cases within the provisions of the Wills Act, 1861 (*d*)) unless it appear to be an effectual testamentary instrument according to the law of the domicil. And, by parity of reasoning, the English Court will grant probate of an instrument ascertained to be testamentary according to the law of the foreign domicil, though invalid and incapable of operation as an English will. Thus (*e*), probate was granted of the will of a married lady, who at the time of her death was domiciled in

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(*t*) Since the rule *mobilia sequuntur personam* is inapplicable to leaseholds (see *ante*, p. 3), it follows (subject to the Wills Act, 1861, s. 2, presently stated, and which speaks of "personal" estate) that to dispose of leaseholds a will must be executed according to 1 Vict. c. 26, and that the will of a domiciled foreigner not so executed, though it may be proved here, and will enable the executor to sell leaseholds (*Hood* v. *Lord Barrington*, L. R. 6 Eq. 218), will not operate on the beneficial interest; the title of the executor is from the probate: the beneficial interest devolves as undisposed of: *Pepin* v. *Bruyère*, [1900] 2 Ch. 504; [1902] 1 Ch. 24.

(*u*) As to his next-of-kin, see *Re Goodman's Trusts*, 17 Ch. D. 266.

(*x*) *Somerville* v. *Lord Somerville*, 5 Ves. 750; and see *Hog* v. *Lashley*, 6 Br. P. C. Toml. 577.

(*y*) *Stanley* v. *Bernes*, 3 Hagg. 373; *Moore* v. *Darell*, 4 Hagg. 346; *Craigie* v. *Lewin*, 3 Curt. 435; *Bremer* v. *Freeman*, 10 Moo. P. C. C. 306; *Stokes* v. *Stokes*, 78 L. T. 50, where the question was referred to: What would be the rule if the *lex domicilii* prescribed no formalities?

(*z*) *In b. Osborne*, 1 Jur. (N.S.) 1220; *In b. Maraver*, 1 Hagg. 498.

(*a*) *Whicker* v. *Hume*, 7 H. L. C. 124; *Thornton* v. *Curling*, 8 Sim. 310; *Campbell* v. *Beaufoy*, Johns. 320; *Kilpatrick* v. *Kilpatrick*, 6 Br. P. C. 584, cit.; *Doglioni* v. *Crispin*, L. R. 1 H. L. 301; *Macdonald* v. *Macdonald*, L. R. 14 Eq. 60.

(*b*) *Bernal* v. *Bernal*, 3 My. & Cr. 559, n.; *Enohin* v. *Wylie*, 10 H. L. C. 1; *Wallace* v. *Att.-Gen.*, 35 Beav. 21; *Barlow* v. *Orde*, L. R. 3 P. C. 164 (*lex loci* admitting illegitimate with legitimate children); *Re Harman*, [1894] 3 Ch. 607 (will in French operating as an appointment under section 27 of the Wills Act).

(*c*) *Re Cunnington*, [1924] 1 Ch. 68.

(*d*) *Post*, p. 11.

(*e*) *In b. Maraver*, 1 Hagg. 498. As to the law of Spain respecting testamentary dispositions, see *Moore* v. *Darell Budd*, 4 Hagg. 346; *Re Hernando*, 27 Ch. D. 284.

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Spain (of which country she was, it seems, also a native), on its being shown that by the Spanish law a feme covert may, under certain limitations, dispose of her property by will as a feme sole.

Ancillary probate.

And it is the constant practice of the Court of Probate, in its discretion (*f*), to grant ancillary probate or letters of administration *cum testamento annexo* of wills of testators domiciled in foreign countries, which have been previously proved there, without inquiring or permitting inquiry into the grounds of the foreign proceeding, though the bulk of the property of the deceased testator should happen to be in England (*g*). If no foreign grant has been made, the English Court of Probate will make a grant to the person entitled to it by the law of the domicil (*h*).

But some foreign States disregard domicil altogether, and treat the devolution of the property of a deceased person as governed by the law of his nationality. It has been decided that if a British subject makes his permanent home in such a country, the devolution of his property, in the event of his dying intestate, is governed by the law of his domicil of origin (*i*).

Effect where probate is granted in error.

Where probate has been granted of an instrument eventually ascertained not to be testamentary according to the law of the domicil, this proceeding (though it vests the whole personalty which is within the jurisdiction of the Court in the executor, as to whose legal title the grant of probate is conclusive) does not

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(*f*) See *In b. Ewing*, 6 P. D. 19.

(*g*) *In b. Read*, 1 Hagg. 474; *Hare* v. *Nasmyth*, 2 Add. 25; *In b. Gayner*, 4 No. Cas. 696; *Enohin* v. *Wylie*, 10 H. L. C. 1; *In b. Earl*, L. R. 1 P. & D. 450; *Miller* v. *James*, L. R. 3 P. & D. 4; *In b. Cosnahan*, L. R. 1 P. & D. 183; *In b. Hill*, L. R. 2 P. & D. 89; *In b. Rule*, 4 P. D. 76; *In b. Smith*, 16 W. R. 1130; *In b. Briesemann*, [1894] P. 260; *In b. Lemme*, [1892] P. 89; *In b. Von Linden*, [1896] P. 148; *Re Price*, [1900] 1 Ch. 442; *In b. Meatyard*, [1903] P. 125; *In b. Von Faber*, 20 T. L. R. 640; *In b. Reuss-Köstritz*, 49 L. J. P. 67; *In b. Miller*, 8 P. D. 167; *In b. Crawford*, 15 P. D. 212. See also the Colonial Probates Act, 1892; *In b. Smith*, [1904] P. 114.

(*h*) *Meyappa Chetty* v. *Supramanian Chetty*, [1916] 1 A. C. 603, at p. 609. In *Robinson* v. *Palmer*, [1901] 2 Ir. R. 489, probate was granted in Ireland of the will of a domiciled Englishman, his assets being in Ireland.

(*i*) *Re Johnson*, [1903] 1 Ch. 821; as to this case, see *post*, p. 26. Suppose an Englishman died possessed of personal property situate in England, but domiciled in Italy, and possessed of personal property in that country, and having made a will admitted to probate there: it seems that in the Italian Courts his testamentary capacity would be governed by the law of England, and it is submitted that our Courts should follow the same rule, otherwise the singular result might be that the Italian Courts would give full effect to his testamentary dispositions in respect of his moveables in Italy, while the English Courts would give his wife and family the same rights in respect of his moveables in England which they would have had under the law of Italy if he had been an Italian subject. The question is discussed in Mr. Pawley Bate's Essay on the Doctrine of Renvoi, and in Mr. Dicey's Conflict of Laws. As to restrictions imposed on testamentary capacity by the laws of foreign countries, see a Return presented to the House of Commons in 1908 (Miscellaneous, No. 7).

regulate or affect the ultimate destination of the property, which therefore the executor will be bound to distribute according to the law of the domicil (*k*).

Foreign law, how ascertained.

Where the construction of the will is to be regulated by foreign law, the opinion of an advocate versed in such law is obtained, for the information and guidance of the English Court on which devolves the task of construing it (*l*); or the English Court may remit a case for the opinion of a Court in any other part of the British dominions (*m*), or of a Court in any foreign country with which there is a convention for that purpose (*n*). But if the point in dispute depend upon principles of construction common to both countries, the Court will adjudicate upon the question, according to its own view of the case, without having recourse to the assistance of a foreign jurist (*o*). And if the witnesses refer to passages from the code of their country as containing the law applicable to the case, the Court will itself examine those passages, and consider what is their proper meaning (*p*).

Validity and construction not affected by change of domicil.

By section 3 of Lord Kingsdown's Act (Wills Act, 1861), it is provided that no will or other testamentary instrument shall be held to be revoked or have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicil of the person making the same (*q*). This section applies to foreigners as well as to British subjects (*r*).

(*k*) *Thornton* v. *Curling*, 8 Sim. 310. In this case, an Englishman went to reside in France, where he was domiciled at his death, and left a will providing for an illegitimate child and its mother, to the exclusion of his wife and legitimate child, which the French law does not permit. Donations by a Frenchman (whether testamentary, or by act *inter vivos*) must not exceed a moiety if he leave at his decease one legitimate child, a third if he leave two, and a fourth if he leave three or more; the descendants of a deceased child being considered as one. Moreover, a Frenchman cannot dispose of the whole of his property, if he leaves only ascendants. Code Civil, §§ 913, 914, 915; for the German law, see § 2303 of the Bürgerliches Gesetzbuch.

(*l*) *Harrison* v. *Harrison*, L. R. 8 Ch. 346; *i.e.*, of an advocate practising in the particular foreign country; study elsewhere of its laws is insufficient: *Bristow* v. *Sequeville*, 5 Ex. 275; *In b. Bonelli*, 1 P. D. 69. In *In b. Dost Aly Khan*, L. R. 6 P. D. 6, concerning the will of a Persian subject, the Court allowed the law applicable to the case to be proved by the Persian ambassador, there being no professional lawyers in Persia.

(*m*) 22 & 23 Vict. c. 63; acted on in *Login* v. *Princess of Coorg*, 30 Bea. 632; and in *Bradford* v. *Young*, L. R. 26 Ch. D. 656, 671, but see same case on appeal, 29 Ch. D. 617, 622.

(*n*) 24 Vict. c. 11.

(*o*) *Bernal* v. *Bernal*, 3 My. & C. 559; *Collier* v. *Rivaz*, 2 Curt. 855; *Earl Nelson* v. *Earl Bridport*, 8 Beav. 527, 547; *Yates* v. *Thompson*, 3 Cl. & Fin. 586; *Martin* v. *Lee*, 9 W. R. 522. But the Court here is bound by a previous judgment *in rem* of the Court of the domicil: *Doglioni* v. *Crispin*, L. R. 1 H. L. 301; *Re Trufort*, 36 Ch. D. 600, *post*, p. 25.

(*p*) *Concha* v. *Murrieta*, 40 Ch. D. 543. See *De Nicols* v. *Curlier*, [1900] A. C. 21.

(*q*) *In b. Rippon*, 32 L. J. Prob. 141; *In b. Reid*, L. R. 1 P. & D. 74. As to the question whether an invalid (or inoperative) will can be made valid (or operative) by a change in the testator's domicil, see Dicey, 682 *et seq.*

(*r*) *Re Groos*, [1904] P. 269.

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Administration.

The general rule that the law of the domicil applies to the moveable property of a deceased person, must be understood as meaning that it governs the devolution of the property. "For the purpose of succession and enjoyment, the law of the domicil governs the foreign personal assets. For the purpose of legal representation, of collection, and of administration, as distinguished from distribution among the successors, they [the assets] are governed not by the law of the owner's domicil, but by the law of their own locality" (*s*). This question is referred to in a later chapter (*t*).

Will exercising power.

The general rule that a will, in order to be valid and operative with regard to the moveable property comprised in it, must comply with the law of the testator's domicil, is subject to an exception in the case of a will exercising a power of appointment. The question of the testator's capacity to exercise a power of appointment seems to depend on the intention of the parties creating the power; if it was intended that the property or trust fund should be governed by English law, the *lex domicilii* is immaterial (*u*). So with regard to the formalities of execution, if the will is executed in the particular form required by the power, it will, as a general rule, be good without reference to the law of the testator's domicil, because the appointee takes, not under the instrument exercising, but under the instrument creating, the power (*x*).

Effect of treaty with foreign country.

Another exception to the general rule exists where, by treaty between this country and the country of domicil, it is agreed that the English law shall prevail. Thus subjects of the Ottoman Empire cannot dispose of their property by will, but by treaty

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(*s*) Judgment of the Privy Council in *Blackwood* v. *R.*, 8 A. C. p. 93; followed in *Henty* v. *R.*, [1896] A. C. 567. Other cases are, *Preston* v. *Melville*, 8 Cl. & F. 1; *Cook* v. *Gregson*, 2 Dr. 286; *Enohin* v. *Wylie*, 10 H. L. C. 1; *Doglioni* v. *Crispin*, L. R. 1 H. L. 301; *Re Hernando*, 27 Ch. D. 284; *Ewing* v. *Orr-Ewing*, 9 A. C. 34; 10 A. C. 453; *Re Trufort*, 36 Ch. D. 600; *Re Hewit*, [1891] 3 Ch. 568 (land situate abroad).

(*t*) *Post*, p. 1965-6, where the case of *Re Klœbe*, 28 Ch. D. 175, is cited. As to administration proceedings, see *Hamilton* v. *Dallas*, 38 L. T. 215; *Stirling-Maxwell* v. *Cartwright*, 11 Ch. D. 522; *Ewing* v. *Orr-Ewing*, 9 A. C. 34; 10 A. C. 453.

(*u*) See Chap. XXIII (Powers), where *Re Hernando*, 27 Ch. D. 284; *Re Mégret*, [1901] 1 Ch. 547, and other cases, are referred to. With reference to the question by what law a settlement is intended to be governed, see *Re Fitzgerald*, [1904] 1 Ch. 573, where the principal authorities are cited.

(*x*) This subject is more fully dealt with in the chapter on Powers. See *Tatnall* v. *Hankey*, 2 Moo. P. C. C. 342; *In b. Alexander*, 29 L. J. P. 93; *In b. Hallyburton*, L. R. 1 P. & D. 90. In the fourth and fifth editions of this work it is stated, on the authority of Story, Confl. c. viii; 3 Burge, pt. 2, c. 20, that "the latter instrument [*i.e.*, the instrument creating the power] is to be construed according to the law of the place where it is executed, if it deals with moveables, and according to the *lex loci rei sitæ* if with immoveables." As I have some doubt as to the correctness of this statement, I have removed it from the text [note by C. Sweet].

English subjects domiciled there are allowed to do so, and their wills must be executed according to the English law (*y*).

Construction.

The rule that a will is to be construed according to the law of the domicil, will yield to the expression of a contrary intention by the testator (*z*); but it seems that the use of the technical terms of the law of a foreign country, in the will of a testator having an English domicil, will not of itself be regarded as an indication of intention that the will is to be construed according to the foreign law (*z*).

This exception to the general rule is often of importance in the case of a will which exercises a power of appointment (*a*).

Inconvenience of old law.

The doctrine that the will of an Englishman is governed by the law of his domicil at the time of his death has always led to inconvenience. Mr. Jarman pointed out (*b*) that "a will may have been made in England, be written in the English language, the testator may have described himself as an Englishman (*c*), and it may have been proved in an English Court; and yet, after all, it may turn out, from the extrinsic fact of the maker being domiciled abroad at his death, that the will is wholly withdrawn from the influence of English jurisprudence."

In *Bremer* v. *Freeman* (*d*), the testatrix was an English subject resident in Paris, and executed a will conformably to English law; but probate of it was refused on the ground that she was domiciled in France, and that the will was not valid according to French law.

Wills Act, 1861.

II.—Lord Kingsdown's Act.—To obviate such questions with regard to testators dying after August 6, 1861, it is enacted by

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(*y*) *Maltass* v. *Maltass*, 7 Jur. 135; 8 Jur. 860. No such rule applies to British subjects resident in China: *Re Tootal's Trusts*, 23 Ch. D. 532; or in Egypt: *Abd-ul-Messih* v. *Farra*, 13 A. C. 431.

(*z*) *Bradford* v. *Young*, 29 Ch. D. 617. In *Re Cunnington*, [1924] 1 Ch. 68, there was no contrary intention.

(*a*) *Re Harman*, [1894] 3 Ch. 607; *Re Price*, [1900] 1 Ch. 442; *Re Bald*, 66 L. J. Ch. 524. See *post*, p. 831.

(*b*) First edition, p. 5. This statement only applies to moveable property, *ante*, p. 1.

(*c*) "This of course is not conclusive (as to which see *Nevinson* v. *Stables*, 4 Russ. 210), though the fact of a testator being described as resident abroad would produce suspicion and inquiry as to the foreign domicil" (note by Mr. Jarman).

(*d*) 10 Moo. P. C. C. 306. The case was a curious one; for the law of France does not permit a foreigner to acquire a domicil there, so as to affect the mode of making a will, without licence from the Government; in other words, without such licence the foreigner may make a will according to the law of his nationality. In France, therefore, the English will would have been held good (see Sug. R. P. S. p. 404; *Collier* v. *Rivaz*, 2 Curt. 855; *Re Trufort*, L. R. 36 Ch. D. 600), and it had in fact been pronounced valid on that ground by the Prerogative Court (1 Deane, 192).

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the Wills Act, 1861 (24 & 25 Vict. c. 114), that (section 1) every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicil of such person at the time of making the same, or at the time of his death) shall as regards personal estate be held to be well executed for the purpose of being admitted to probate, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicil of origin (*e*); and (section 2) that every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicil of such person at the time of making the same or at the time of his death) shall as regards personal estate be held to be well executed, and shall be admitted to probate, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made. By section 4 the Act is not to invalidate any will or other testamentary instrument as regards personal estate which would have been valid if the Act had not been passed, except as such will or instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by the Act.

Its effect on the legal operation of wills.

Thus, for the purpose of British probate, a choice is given among several forms of execution, all in addition (section 4) to that which alone was formerly sufficient: and, in terms, the Act is directed only to modes of execution; but it has been held that a testamentary instrument, depending on the Act for the validity of its execution, must also depend, for its acceptance as a valid testamentary disposition, on the local law on which its execution is rested. Thus, in *Pechell* v. *Hilderley* (*f*), a British subject with an English domicil died in 1867, leaving a will and codicil, neither of which was executed according to the law of England, but the codicil (though not the will) was well executed according to the law of Italy, where it was made. By that law, as proved in the case, it could not stand alone without the will, and did not set up the will, although indorsed upon it. It was argued that the codicil being well executed according to the Act, its legal effect must be determined by the *lex domicilii*, and that according to that law the codicil established and made good the will (*g*). But Lord Penzance was of opinion that in determining the

(*e*) See *In b. De la Saussaye*, L. R. 3 P. & D. 42; *In b. Donaldson*, L. R. 3 P. & D. 45; *In b. Gatti*, 27 W. R. 323.

(*f*) L. R. 1 P. & D. 673.

(*g*) *Vide post*, Chap. VI, s. xiv.

question whether any paper was testamentary, regard could be had to the law of one country only at a time, and that the mixing up of the legal precepts of two different countries could only result in conclusions conformable to neither. The Court therefore pronounced against both documents. But in *In b. Lacroix* (*h*) a naturalised British subject executed at Paris a will and codicil in English form relating to his English property only, and a holograph will in French form disposing of his property in France, but referring directly to the English will; Sir J. Hannen seemed to think, assuming the testator's domicil to be French, that all three instruments might be admitted to probate under Lord Kingsdown's Act; eventually, however, probate was granted of the English will and codicil only.

In *Lyne* v. *de la Ferté* (*i*) a testamentary instrument which was *prima facie* invalid under French law was admitted to probate as the defect, a wrong date, could be remedied under French law. In *In b. Forster* (*k*) some pencil notes made in Scotland were admitted to probate.

Notwithstanding the words "according to the forms required by the law of the place" where the will is made, section 1 of the Act applies to a country the law of which does not provide any forms for testamentary dispositions; if a British subject desires to make his will in such a place, any writing which can be identified as a will is apparently sufficient; at all events a holograph will signed by the testator is sufficient (*l*).

The expression "personal estate" in section 1 of the Act, includes leaseholds situate in England (*m*).

"Personal estate" includes leaseholds and an interest in the proceeds of the sale of land.

It also includes a reversionary interest in freeholds held upon trust for sale (*n*), but this does not mean that such an interest is a moveable (*o*).

Scope of Act.

Sections 1, 2 and 4 of Lord Kingsdown's Act affect British subjects only, and therefore do not apply to any subject of a foreign country (*p*), even in the case of a woman born a British subject who has become a foreign subject by marriage (*q*). On the other hand, they apply to naturalised British subjects (*r*), although section 1 assumes that the testator had his domicil of origin in some part of the British dominions. It seems clear that the Act only refers to the validity of the will in point of form,

(*h*) 2 P. D. 94.
(*i*) 102 L. T. 143.
(*k*) 67 Sol. J. 199.
(*l*) *Stokes* v. *Stokes*, 78 L. T. 50.
(*m*) *Re Grassi*, [1905] 1 Ch. 584; *Re Watson*, 35 W. R. 711.
(*n*) *Re Lyne's Settlement Trusts*, [1919] 1 Ch. 80.
(*o*) *Re Berchtold*, [1923] 1 Ch. 192.
(*p*) *In b. Keller*, 61 L. J. P. 39.
(*q*) *In b. Von Buseck*, 6 P. D. 211; *Bloxam* v. *Favre*, 9 P. D. 130.
(*r*) *In b. Gally*, 1 P. D. 438; *In b. Lacroix*, 2 P. D. 94.

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and that it does not affect any question as to its material validity, such as the question of testamentary capacity (*s*).

Where a British subject dies in a foreign country, having left a will executed in England in English form, the case is within section 2 of the Act, and the executor appointed by the English will is entitled to probate without regard to the domicil of the deceased (*t*); but if a foreign Court has appointed persons to administer the estate the English Court does not grant probate so as to conflict with such appointment (*u*).

III.—Conflict of Laws.—Even if Lord Kingsdown's Act does affect the question of testamentary capacity (as appears to be assumed by some writers (*x*)), it is clear that foreign Courts are not bound to recognise the Act in determining whether a given instrument is a valid will of personal property within their own jurisdiction : and thus the personal property, British and foreign, of a British subject may be distributable according to two distinct laws. Therefore, the necessity of conforming in the testamentary act to the law of the domicil is still an important doctrine to the numerous British residents in foreign countries; and it appears that the circumstance of the contents of the will indicating that the testator contemplated returning to England (but which intention he never executed (*y*)), or even an express declaration that he intends to retain his domicil of origin (*z*), is insufficient to exclude the law of his domicil ascertained by the facts of the case (*a*).

Some foreign countries do not recognise domicil as governing the succession to the moveable property of a deceased person, but treat it as governed by the law of the country of which he was a subject. The right principle to be applied in cases of this kind cannot be said to be satisfactorily settled, but at present the result appears to be that a British subject who makes his permanent home in such a country retains his domicil of birth so far as regards the distribution of his property in England (*b*).

Suggestions as to wills of Englishmen domiciled abroad.

If an Englishman, domiciled abroad, has real estate

(*s*) See Dicey, Conflict of Laws, p. 687. The point did not arise in *Re Groos*, [1904] P. 269; [1915] 1 Ch. 572 (*ante*, p. 9), as the will was expressly made in accordance with the law governing the testatrix's testamentary capacity. Some remarks on the Act will be found in Sugden's R. P. Stat. 405—6.

(*t*) *In b. Cocquerel*, [1918] P. 4.

(*u*) *In b. Meatyard*, [1903] P. 125.

(*x*) Mr. Vincent, in the fourth edition of this work, p. 8, n. (*n*); and apparently Lord St. Leonards (Sugden, R. P. S. 405—6).

(*y*) *Stanley* v. *Bernes*, 3 Hagg. 375.

(*z*) *Re Steer*, 3 H. & N. 594. See *McMullen* v. *Wadsworth*, 14 App. Cas., at p. 636; and *Re Annesley*, [1926] Ch. 692.

(*a*) As to the *animus revertendi*, see also *Bruce* v. *Bruce*, 2 B. & P. 229. n.

(*b*) *Re Johnson*, [1903] 1 Ch. 821, *post*, p. 26.

(including in this definition property held by him for terms of years) in his native country, and also personal property there or elsewhere, he ought to make two wills, one devising his English lands, duly framed and executed for that purpose according to the forms of the English law, and the other bequeathing, if permitted, his personal (or rather his moveable) estate conformably to the foreign law. Wills made under such circumstances require more than ordinary care, in order to avoid some perplexing questions arising out of the conflict in the laws governing the real and personal property respectively (*c*), and also in order to avoid any question of incorporation by reference (*d*).

As to Scotland.

Such questions may arise, and indeed have most frequently arisen, in regard to the property of Englishmen domiciled in Scotland, or of Scotsmen domiciled in England; the law of succession and testamentary disposition being, in some respects, different in these two sections of the United Kingdom (*e*). Thus, in *Balfour* v. *Scott* (*f*), where a person domiciled in England died intestate, leaving real estate in Scotland, the heir was one of the next-of-kin, and claimed a share of the personal estate. By the law of Scotland, the heir cannot share in the personal property with the other next-of-kin, except on condition of collating the real estate; that is, bringing it into a mass with the personal estate, to form one common subject of division (*g*). It was determined, however, that he was entitled to take his share without complying with that obligation, the case being regulated as to the moveable property by the English law.

In *Drummond* v. *Drummond* (*h*), a person domiciled in

(*c*) See *Brodie* v. *Barry*, 2 V. & B., at p. 131; *In b. Smart*, 9 P. D. 64; and *Re Clark*, [1904] 1 Ch. 294.

(*d*) See *In b., Murray*, [1896] P. 65, *post*, p. 127.

(*e*) In Scotland there was formerly no direct power of disposing of real estate by will, but if there was a conveyance previously executed according to the proper feudal forms, the party might by will declare the use and trust to which it should enure. *Per* Sir W. Grant in *Brodie* v. *Barry*, 2 V. & B. 132. But by 31 & 32 Vict. c. 101, s. 20, land in Scotland may now be disposed of directly by will. Where a domiciled Scotsman dies intestate, leaving infant children, and possessed of property in Scotland and England, the Court of Session, it seems, appoints a factor to the children, to whom the English Court grants administration: *In b. Johnston*, 4 Hagg. 182; see *Studd* v. *Cook*, 8 App. Cas. 577.

In some editions of this work it was suggested that if a Scotsman, *i.e.*, a British subject, were to make a will, which by the law of Scotland is not revoked by marriage, and were subsequently to marry in England after having acquired an English domicil, a question of some nicety might probably arise as to whether the will was revoked by the marriage. See *per* Wilde, J., in *In b. Reid*, L. R. 1 P. & D., at p. 76. In a similar case (*Re Martin*, [1900] P. 211) it was decided that the will was revoked by the marriage, but in that case the domicil of the husband at the time of the marriage was English.

(*f*) 6 Br. P. C. 550, stated in *Somerville* v. *Lord Somerville*, 5 Ves. 750, and cited 2 V. & B. 131; and see *Allen* v. *Anderson*, 5 Hare, 163.

(*g*) Ersk. Inst. Law of Scotland, 701 (5th ed.).

(*h*) 6 Br. P. C. 601, cit. 2 V. & B. 132.

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England had real estate in Scotland, upon which he granted a heritable bond to secure a debt contracted in England. He died intestate; and the question was, by which of the estates this debt was to be borne? By the English law then in force (*i*) the personal estate was the primary fund for the payment of debts; but, by the law of Scotland, the real estate was the primary fund for the payment of the heritable bond. It was determined that the law of Scotland should prevail, and that the real estate must bear the burden (*k*).

Speaking of these two cases, Sir Wm. Grant has observed (*l*): "In the first case, the disability of the heir did not follow him to England; and the personal estate was distributed as if both the domicil and the real estate had been in England. In the second, the disability to claim exoneration out of the personalty did follow him into England; and the personal estate was distributed as if both the domicil and the real estate had been in Scotland."

But by the law of Scotland, (as of England before 1925), real estate is only a subsidiary fund for the payment of the moveable debts; and if the Scottish heir of a domiciled Englishman has paid them, the law of the domicil allows him to recover against the personal estate (*m*). Conversely, English rules of marshalling in favour of legatees will not be applied so as to throw on Scottish real estate debts of a domiciled Englishman, to which it could not be made liable by the *lex loci* (*n*).

In all these cases the claim on the Scottish heir to exoneration, or his liability to be charged, was enforced by English Courts in distributing the personal estate only where the laws of both countries agreed in conceding the claim or imposing the charge.

Domicil—how ascertained.

IV.—Domicil.—A statement of some of the more important rules for ascertaining the domicil of a testator, and a reference to the cases of most frequent occurrence, may here be made (*o*).

(*i*) An heir or devisee cannot now claim payment of a mortgage debt out of the testator's personal assets; see section 1 of the Real Estates Charges Act, 1854, now replaced by section 35 of the Administration of Estates Act, 1925, Chap. LIV.

(*k*) But an express direction by a testator domiciled in England for payment of all his debts out of a specified fund will include the heritable bond: *Maxwell* v. *Maxwell*, L. R. 4 H. L. 506. Locke King's Acts (*post*, Chap. LIV) do not extend to Scotland. A heritable bond will not pass by an English will: *Jerningham* v. *Herbert*, 4 Russ. 388; but where there is an English security, and the debt is further secured by a Scottish heritable bond, the debt will pass by an English will: *Buccleuch* v. *Hoare*, 4 Mad. 467; *Cust* v. *Goring*, 18 Bea. 383. See further as to the nature of heritable bonds, Bell's Commentaries on the Laws of Scotland, 206; Ersk. Inst. 194.

(*l*) *Brodie* v. *Barry*, 2 V. & B., at p. 132.

(*m*) *Earl of Winchelsea* v. *Garetty*, 2 Keen, 293.

(*n*) *Harrison* v. *Harrison*, L. R. 8 Ch. 342.

(*o*) As to domicil generally, see Dicey, Conflict of Laws; Westlake, Private Int. Law; and a valuable note in Hayes and Jarman's Concise Forms of

How determined.

The question of domicil is determined by English Courts according to the doctrines of English law, except (it seems) in those cases in which a person is resident in a country which does not recognise domicil as regulating questions of succession (*p*).

Domicil of birth or origin.

The law attributes to everyone as soon as he is born the domicil of his father, if he be legitimate, and the domicil of his mother, if illegitimate (*q*). This is the domicil of birth, or, as it is more frequently called, the domicil of origin (*r*), and is involuntary. Another instance of involuntary domicil is where the domicil of an infant is changed by a change in the domicil of its father, or, in the case of a fatherless infant, by a change in the domicil and other acts on the part of its mother (*s*). So the domicil of a lunatic adult may be changed by a change in the domicil of his parent (*t*). In all these cases the altered domicil cannot be regarded as the domicil of origin; it is an acquired domicil (*u*). Probably the domicil which a woman acquires by marrying a man with a different domicil to her own may be looked upon as an involuntary domicil (*x*), but the point is not material, as the important distinction is between the domicil of origin and an acquired domicil, whether voluntary or involuntary.

Legitimacy Act, 1926.

Where an illegitimate person becomes legitimated by virtue of the subsequent marriage of his parents and the Legitimacy

Wills. Most of the definitions of domicil have been copied from the Roman law, in ignorance of the fact that in Roman law *domicilium* meant something quite different from what we understand by "domicil"; hence these definitions are inaccurate when applied to English law: see the judgment of Kindersley, V.-C., in *Lord* v. *Colvin*, 28 L. J. Ch. 361, where a useful definition of "acquired domicil" (that is, a domicil of choice) is given. There was formerly some confusion between the two ideas of nationality and domicil, but the distinction is now too clearly recognised to require discussion. See *Udny* v. *Udny*, L. R. 1 H. L. Sc. 441; *Haldane* v. *Eckford*, L. R. 8 Eq. 631 (where *Re Capdevielle*, 2 H. & C. 985; *Att.-Gen.* v. *Countess Blucher de Wahlstatt*, 3 H. & C. 374, and *Moorhouse* v. *Lord*, 10 H. L. C. 272, are referred to); *Brunel* v. *Brunel*, L. R. 12 Eq. 298; *Douglas* v. *Douglas*, L. R. 12 Eq. 617. As to Northern Ireland, see *Egan* v. *Egan*, [1928] N. Ir. 159.

(*p*) *Per* Lindley, M.R., in *Re Martin*, [1900] P., at p. 227; *Re Johnson*, [1903] 1 Ch. 821, *post*, p. 26.

(*q*) *Dalhousie* v. *M'Douall*, 7 Cl. & F. 817; *Munro* v. *Munro*, 7 Cl. & F. 842; *Re Patten*, 6 Jur. (N.S.) 151; *Udny* v. *Udny*, L. R. 1 H. L. Sc. 441, where the earlier cases, including *The Indian Chief*, 3 C. Rob. Adm. 12, and *Munroe* v. *Douglas*, 5 Madd. 405 (in which Sir John Leach laid down much bad law), are referred to. See now the Legitimacy Act, 1926.

(*r*) The expression is not strictly accurate, for in Roman law *domicilium* and *origo* were two distinct things: see Sweet's Law Dictionary, s. v., "Domicile." In *Winans* v. *Att.-Gen.*, [1904] A. C. p. 290, Lord Macnaghten expressed a preference for the term "domicil of origin."

(*s*) As to this, see *post*, p. 24.

(*t*) *Sharpe* v. *Crispin*, L. R. 1 P. & D. 611.

(*u*) *Re Macreight*, 30 Ch. D. 165; *Re Craignish*, [1892] 3 Ch. 180; *Re Beaumont*, [1893] 3 Ch. 490.

(*x*) In *Udny* v. *Udny*, L. R. 1 H. L. Sc., at p. 457, Lord Westbury said that domicil by operation of law, as on marriage, is a domicil of choice; but this, of course, was a mere expression of opinion. His statement that all domicils, other than the domicil of origin, are domicils of choice, is inaccurate.

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Act, 1926, it is submitted that he acquires the domicil of his father at the date when he becomes legitimate.

Characteristics of domicil of origin.

The chief points which require to be borne in mind in connection with the domicil of origin are: that everyone is assumed to preserve his domicil of origin until it is shown that he has acquired another domicil; that there is a presumption against a man's intention to abandon his domicil of origin; that the domicil of origin revives if a man loses his acquired domicil; and that it is more difficult to lose the domicil of origin than an acquired domicil (*y*).

A man cannot have two domicils.

A man cannot have more than one testamentary domicil (*z*).

Domicil of choice.

As soon as an individual is *sui juris*, it is competent to him to abandon his domicil of origin, and to elect and assume another domicil, which is called his domicil of choice (*a*). When another domicil is put on, the domicil of origin is for that purpose relinquished, and remains in abeyance during the continuance of the domicil of choice, but it revives and exists whenever there is no other domicil (as when the domicil of choice is in fact abandoned (*b*) with the intention of never returning), and it does not require to be regained or reconstituted *animo et facto* in the manner which is necessary for the acquisition of a domicil of choice (*c*). Domicil of choice is constituted by residence freely chosen and intended to continue for a non-limited period (*d*); and length of residence is a most important ingredient from which to infer the *animus manendi* (*e*), but it is not conclusive (*f*).

Recurrence of domicil of origin.

(*y*) *Lord* v. *Colvin*, 28 L. J. Ch. 361; *Bell* v. *Kennedy*, L. R. 1 H. L. Sc. 307; *Udny* v. *Udny*, *ib.* 441; *Huntly* v. *Gaskell*, [1906] A. C. 56.

(*z*) *Forbes* v. *Forbes*, Kay, 353. See Dicey, p. 98, and *Crookenden* v. *Fuller*, 29 L. J. P. 1. The notion that a man can have two domicils is probably derived partly from a misapprehension as to the meaning of *domicilium* in Roman law (see Sweet's Law Dictionary, s. v.) and partly from the use of the French word *domicile* in the sense of "residence": see *McMullen* v. *Wadsworth*, 14 App. Cas. 631, where the phrase "international domicil" appears to be used as meaning "domicil" in the proper sense of the term.

(*a*) See *Bempde* v. *Johnstone*, 3 Ves. 198; *Drevon* v. *Drevon*, 12 W. R. 946; *King* v. *Foxwell*, 3 Ch. D. 518.

(*b*) The intention without the act of abandonment is insufficient: *In b. Raffenell*, 32 L. J. P. 203; *Re Marrett*, 36 Ch. D. 400. And the mere fact that a person sails for his native country from the country where he has acquired a domicil of choice does not prove that he intended to abandon it: *Lyall* v. *Paton*, 25 L. J. Ch. 746 (where the testator died *in itinere*). As to reacquisition of domicil of choice, see *Fleming* v. *Horniman*, 138 L. T. 669.

(*c*) *King* v. *Foxwell*, 3 Ch. D. 518.

(*d*) As to what constitutes a non-limited period, see *Anderson* v. *Laneuville*, 9 Moo. P. C. 325.

(*e*) *Cockrell* v. *Cockrell*, 25 L. J. Ch. 732; *Doucet* v. *Geoghegan*, 9 Ch. D. 441; *Re Craignish*, [1892] 3 Ch. 180. By the Domicile Act, 1861, power is given to the Crown to make conventions with foreign countries for the purpose of establishing rules as to the formalities required for a change of domicil by subjects of the two countries between which the convention is made. As to the operation of this Act, see Sugd. R. P. S. p. 405. It is believed that no such convention has been entered into.

(*f*) *Re Patience*, 29 Ch. D. 976, and other cases cited *infra*.

The burden of proof is on those who allege that the domicil of origin has been lost (*g*).

Domicil determined by English law.

The question whether a person is or is not domiciled in a foreign country is to be determined in accordance with the requirements of English law as to domicil, irrespective of the question whether the person in question has or has not acquired a domicil in the foreign country in the eyes of the law of that country (*h*).

How far residence is a test of domicil.

"The question of domicil," said Lord Loughborough, in the case of *Bempde* v. *Johnstone* (*i*), "*prima facie* is much more a question of fact than of law. The actual place where [a person] is, is *prima facie* to a great many given purposes his domicil. You encounter that, if you show, it is either constrained, or from the necessity of his affairs, or transitory; that he is a sojourner; and you take from it all character of permanency. If on the contrary you show, that the place of his residence is the seat of his fortune; if the place of his birth, upon which I lay the least stress; but if the place of his education, where he acquired all his early habits, friends and connections, and all the links that attach him to society, are found there; if you add to that, that he had no other fixed residence upon an establishment of his own, you answer the question; which would be, where does he reside? In London. Is that his domicil? It is: unless you show, that is not the place where he would be, if there were no particular circumstance to determine his position in some other place at that period."

Lord Loughborough's remark that a transitory residence in a country is not sufficient to show that the person in question has acquired a domicil of choice there, is borne out by the decision in *Re Patience* (*k*). In that case P.'s domicil of origin was Scottish; he was in the Army and served abroad until 1860, when he retired; from that time until his death in 1882 he resided in lodgings, hotels, and boarding houses in various places in England; from the year 1810 till his death he never revisited Scotland, and he left no property whatever in that country; it was held that his domicil was Scottish (*l*). On the other hand, in *Re Craignish* (*m*), where the plaintiff's domicil

(*g*) *Winans* v. *Att.-Gen.*, [1904] A. C. 287; *Huntley* v. *Gaskell*, [1906] A. C. 56.

(*h*) *Re Annesley*, [1926] 1 Ch. 692, at p. 705.

(*i*) 3 Ves. 201. See also *Udny* v. *Udny*, L. R. 1 H. L. Sc. 441; *Stevenson* v. *Masson*, L. R. 17 Eq. 78.

(*k*) 29 Ch. D. 976.

(*l*) *Lord* v. *Colvin*, 28 L. J. Ch. 361, and *Huntly* v. *Gaskell*, [1906] A. C. 56, are other examples of the strictness with which an intention to acquire a new domicil must be proved.

(*m*) [1892] 3 Ch. 180. This was a peculiar case, inasmuch as the question arose during the lifetime of the person whose domicil was in dispute.

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of origin was Scottish, it was held on the evidence that he had acquired a domicil in England; he had led a roving life in all parts of the world until he married, when he came to London, and lived there in hotels and lodgings for a few years, when he took a furnished house; he never seems to have had a permanent "home" in England, but his intention to settle in that country appeared from his mode of life. *Att.-Gen.* v. *Dunn* (*n*), *Goulder* v. *Goulder* (*o*), and *Winans* v. *Att.-Gen.* (*p*), are also cases in each of which the unsettled life of the testator made it difficult to say with confidence where his "home" was.

Divided residence.

Where an Englishman or Scotsman divides his time about equally between the two countries, the actual domicil is sometimes difficult to be ascertained, from the absence of preponderating evidence in favour of either. Such was the case of Lord Somerville (*q*), a Scotchman, originally domiciled in Scotland, who was elected a representative peer of Scotland, took a house in London, and lived there half the year, the remainder of which he spent in Scotland, where he still had an establishment; he died at his house in London. Sir R. P. Arden, M.R., after an elaborate argument, held that the original domicil remained unchanged, and, consequently, the succession to the personal property of the deceased nobleman (who had died intestate) was to be governed by the law of Scotland. In cases of residence equally divided between two places, the constant residence of his wife and family in one of them is strong evidence of *animus* in favour of domicil in that place (*r*).

Marriage.

The fact that a man, living in a foreign country, marries a woman who is a native of that country, tends to show an intention on his part to make it his permanent home (*s*).

Residence necessity

Lord Loughborough's remark that a residence which is "constrained" does not produce a change of domicil, is also borne out by the authorities.

—in public service, etc.

If the residence is "constrained" by external necessity, as by the duties of military or naval service (*t*); or of a temporary

(*n*) 6 M. & W. 511.
(*o*) [1892] P. 240.
(*p*) [1904] A. C. 287.
(*q*) *Somerville* v. *Lord Somerville*, 5 Ves. 750.
(*r*) *Forbes* v. *Forbes*, Kay, 364; *Aitchison* v. *Dixon*, L. R. 10 Eq. 589; *Platt* v. *Att.-Gen. of New South Wales*, 3 A. C. 336. But see *per* Wickens, V.-C., *Douglas* v. *Douglas*, L. R. 12 Eq. 647.
(*s*) See *Re Grove*, 40 Ch. D. 216. The presumption appears to have been rebutted by other circumstances in *D'Etchegoyen* v. *D'Etchegoyen*, 13 P. D. 132.
(*t*) *Att.-Gen.* v. *Napier*, 6 Ex. 217; Phillim. Domicile, p. 79. Persons entering the military service of a foreign State acquire the domicil of that State, *ib.*; and service under the East India Co. formerly gave an Indian or Anglo-Indian domicil: *Bruce* v. *Bruce*, 2 B. & P. 229; *Munroe* v. *Douglas*, 5 Madd. 379; *Craigie* v. *Lewin*, 7 Jur. 519; *Moorhouse* v. *Lord*, 10 H. L. C. 272; *Allardice* v. *Onslow*, 33 L. J. Ch. 434; *Forbes* v. *Forbes*, Kay, 356.

political (*u*) or judicial (*v*) office; by imprisonment (*w*), or by flight from civil commotion or revolution (*x*) or to avoid creditors (*y*); it will not confer a domicil (*z*). But if a person comes to England to escape a sentence of imprisonment passed upon him in his native country, this will not prevent his acquiring an English domicil, if he shows an intention of settling permanently in this country (*a*). Again, neither an ambassador (*b*), nor a consul (*c*), loses his original domicil merely by residence in the foreign country where he is accredited. But a person holding a permanent office in an English colony which requires his residence there, may show an intention of making it his home (*d*). So an ambassador (*e*), or a consul (*f*), may by his conduct and declarations show an intention to acquire a domicil in the country where he lives. And if a consul engage in trade, his character of consul is, for some purposes at least, merged in that of merchant (*g*). On the other hand, if, being already domiciled in a foreign country, a man be appointed by his own sovereign ambassador (*h*) or consul (*i*) in that country, his original domicil is not thereby revived. The status of an English peer does not prevent his acquiring a foreign domicil (*j*).

Effect of entering Army.

It is said that if a foreigner enters the military service of the United Kingdom, he thereby acquires an English domicil (*k*). If so, sufficient importance was not given to the fact in the case of *Re Duleep Singh* (*l*).

With a few immaterial differences, the stat. 1 Vict. c. 26 was made law in India by an Act of Council, No. 25, A.D. 1838, and applies to all wills made on or after February 1, 1839. And by the Indian Succession Act (XXXIX) of 1925, succession to immoveable property in India is regulated by the law of India; that to moveables by the law of the domicil. The Act contains the rules for determining domicil. See *Macdonald* v. *Macdonald*, L. R. 14 Eq. 60.

(*u*) *Att.-Gen.* v. *Pottinger*, 6 H. & N. 733, 747 (Governor of the Cape and of Madras).

(*v*) *Att.-Gen.* v. *Rowe*, 1 H. & C. 31 (Chief Justice of Ceylon).

(*w*) Phillim. on Domicile, p. 87.

(*x*) *De Bonneval* v. *De Bonneval*, 1 Curt. 856.

(*y*) *Pitt* v. *Pitt*, 12 W. R. 1089.

(*z*) This rule applies as well to the loss of an acquired as to that of an original domicil: *Re Macreight*, 30 Ch. D. 165.

(*a*) *Re Martin*, [1900] P. 211.

(*b*) Story, Confl. s. 48; Phillim. on Dom. p. 79.

(*c*) *Sharpe* v. *Crispin*, L. R. 1 P. & D. 611.

(*d*) Dicey, 146; *Commissioners of Inland Revenue* v. *Gordon's Executors*, 12 Cas. Court Sess. 657.

(*e*) *Heath* v. *Sampson*, 14 Bea. 441. (*f*) Dicey, 153.

(*g*) *The Indian Chief*, 3 C. Rob. Ad. 22; Phillim. on Domicil, pp. 124, 125. By the rules of their service British Consuls are forbidden to take part in mercantile affairs. *Sharpe* v. *Crispin*, L. R. 1 P. & D. 617.

(*h*) *Att.-Gen.* v. *Kent*, 1 H. & C. 12: the appointment in that case was as attaché, but the principle seems to apply to ambassadors.

(*i*) *Sharpe* v. *Crispin*, L. R. 1 P. & D. 611.

(*j*) *Hamilton* v. *Dallas*, 1 Ch. D. 257.

(*k*) *President of the United States* v. *Drummond*, 33 Bea. 449. See *ante*, p. 20, n. (*t*).

(*l*) 7 Morrell, 228.

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Local domicil not affected by service under Crown.

Where, as in the United Kingdom, different laws prevail in different parts, a domicil in one, as in Jersey or Scotland, is not altered by entering the military or naval service of the kingdom, whether the domicil is original (*m*) or acquired (*n*). And apparently the same rule applies to the civil service (*o*).

Anglo-Indian domicil.

The old decisions on the so-called Anglo-Indian domicil acquired by the servants of the East India Co. (*p*) are anomalous, and the effect of a residence in India is a matter of doubt (*q*).

Extra-territorial domicil.

Attempts have been made to establish the doctrine that a kind of extra-territorial domicil may be acquired in such countries as China and Turkey, where British subjects have established settlements under the protection of treaties entered into between the British Government and the Government of the country, but it is settled that "the idea of a domicil, independent of locality, and arising simply from membership of a privileged society, is not reconcilable with any of the numerous definitions of domicil to be found in the books" (*r*). There is, therefore, no such thing as an Anglo-Chinese or Anglo-Egyptian domicil.

Residence in half-civilised countries.

The effect of residence in conferring a new domicil may also be counteracted by the nature of the community in which the testator lived. If there is a fundamental difference between the religion, laws, habits and customs of that community and those of the testator's native country—as where he, being an Englishman, has resided in a country like China or Turkey—a presumption is raised against his having acquired a domicil in that country (*s*). But a British subject resident in Egypt and registered as such at the British Consulate can acquire an Egyptian domicil (*ss*).

Residence may be short.

On the other hand, it seems clear that if a person has made up his mind to leave the place of his original domicil and permanently settle in another country, a residence in pursuance of that intention, however short, will establish a domicil there (*t*).

Residence for business: intention to return.

If it appears that a man resides in a foreign country for the purposes of his private business, always retaining the wish and intention of returning to his native country, he does not lose his

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(*m*) *In b. Patten*, 6 Jur. (N.S.) 151; *Brown* v. *Smith*, 15 Bea. 444; *Ex p. Cunningham*, 13 Q. B. D. 419.

(*n*) *Re Macreight*, 30 Ch. D. 165.

(*o*) *Urquhart* v. *Butterfield*, 37 Ch. D. 357.

(*p*) *Ante*, p. 20, n. (*t*).

(*q*) *Jopp* v. *Wood*, 4 D. J. & S. 616; *Re Tootal's Trusts*, 23 Ch. D. 532; Dicey, 156, 738.

(*r*) Judgment of P. C. in *Abd-ul-Messih* v. *Farra*, 13 A. C. p. 439, approving *Re Tootal's Trusts*, 23 Ch. D. 532.

(*s*) *Re Tootal's Trusts*, 23 Ch. D. 532, following *The Indian Chief*, 3 C. Rob. Ad. 22; *Maltass* v. *Maltass*, 1 Rob. 67.

(*ss*) *Casdagli* v. *Casdagli*, [1919] A. C. 145.

(*t*) *Per* Lord Cranworth in *Bell* v. *Kennedy*, L. R. 1 H. L. Sc. p. 319.

domicil of origin (*u*). But vague expressions of an intention to return at some indefinite future time—such as "when I have made my fortune"—are not of themselves sufficient to show that a man's residence is temporary (*v*). And as a general rule, a man who settles as a trader in a foreign country will thereby commonly acquire a domicil in that country (*w*); nor is the contrary to be inferred merely because, being a British subject, he invariably acts and regards himself as an Englishman (*x*). Nor will his being an officer in the British service on half-pay, and (in order to retain his pay) requiring and obtaining leave of absence (*y*), nor being an officer on unlimited furlough, subject to a positive obligation to return to duty when ordered (*z*), prevent his acquiring a domicil other than British; though such an obligation would be strong to rebut any presumption that a domicil was contemplated in a foreign country where the obligation could not be enforced, for an intention contrary to duty is not to be presumed (*a*).

Residence as trader.

Officer on half-pay.

Residence in any place for health's sake is of dubious import; and further manifestation of intention is requisite before such residence can be assumed to be permanent (*b*).

Residence for health's sake.

In a case where no special circumstances of the kind above referred to present themselves, it may be laid down, as a general rule, that if a person has in fact taken up a permanent residence in a country he will be deemed to have acquired a domicil of choice there, and mere declarations of an intention to return to the country of his birth will not be sufficient to rebut that presumption, so as to revive the original domicil (*c*).

Declarations of intention to return.

The general rule is that the domicil of a married woman is that of her husband, and that married women cannot change

Domicil of married woman.

(*u*) *Jopp* v. *Wood*, 4 D. J. & S. 616.

(*v*) *Doucet* v. *Geoghegan*, 9 Ch. D. 441. The statement of Kindersley, V.-C., in *Allardice* v. *Onslow*, 33 L. J. Ch. p. 436, goes too far.

(*w*) *Cockrell* v. *Cockrell*, 25 L. J. Ch. 730; *Allardice* v. *Onslow*, 33 L. J. Ch. 434; *Doucet* v. *Geoghegan*, 9 Ch. D. 441; *Re Grove*, 40 Ch. D. 216.

(*x*) *Moore* v. *Budd*, 4 Hagg. 346. As to whether treaties between two countries have any bearing on the question of domicil, see *Maltass* v. *Maltass*, 1 Rob. 67.

(*y*) *Cockrell* v. *Cockrell*, 25 L. J. Ch. 730. See also *Commrs. I. R.* v. *Gordon's Executors*, 12 Cas. Court Sess. 657.

(*z*) *Att.-Gen.* v. *Pottinger*, 6 H. & N. 733, 747; *Forbes* v. *Forbes*, Kay, 359; *The Lauderdale Peerage*, 10 A. C. 692. *Secus*, if the furlough be for a limited period: *Craigie* v. *Lewin*, 3 Curt. 435.

(*a*) *Hodgson* v. *De Beauchesne*, 12 Moo. P. C. C. 285.

(*b*) See *Hoskins* v. *Matthews*, 8 D. M. & G. 13; *Johnston* v. *Beattie*, 10 Cl. & F. 138; *Winans* v. *Att.-Gen.*, [1904] A. C. 287; *Re James*, 98 L. T. 438; *Forbes* v. *Forbes*, Kay, 341. See also *per* Lord Selborne in *The Lauderdale Peerage*, 10 A. C., at p. 740.

(*c*) *Att.-Gen.* v. *Kent*, 1 H. & C. 12; *Att.-Gen.* v. *Fitzgerald*, 3 Dr. 610; *Re Steer*, 3 H. & N. 594; *Haldane* v. *Eckford*, L. R. 8 Eq. 631; *Drevon* v. *Drevon*, 12 W. R. 946; *Brunel* v. *Brunel*, L. R. 12 Eq. 298; *Doucet* v. *Geoghegan*, L. R. 9 Ch. D. 441. See *Stevenson* v. *Masson*, L. R. 17 Eq. 78; *Ross* v. *Ellison*, [1929] W. N. 217.

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their domicil of their own acts (*d*). But a wife after a decree of divorce can acquire a domicil of choice (*e*). It is clear that a woman who is living apart from her husband, under an agreement for separation, cannot choose her own domicil (*f*).

Judicial separation.

Whether a wife who had been judicially separated from her husband or whose husband had committed some offence entitling her to a divorce or judicial separation could acquire a domicil different from that of her husband was at one time doubtful (*g*), but the decision of the Privy Council in *Att.-Gen. for Alberta* v. *Cook* (*h*) shows that a decree for judicial separation does not enable a wife to acquire such a domicil.

Domicil of children.

The domicil of a legitimate child is that of the father, and the domicil of an illegitimate child is that of the mother (*k*). The domicil of the child changes with the domicil of the father or mother.

It has been made a question, whether infant children, who, after the death of the father, remain under the care of their mother, follow the domicil which she may from time to time acquire, or retain that which their father had at his death, until they are capable of gaining one by acts of their own. As a general rule, the domicil of the children in such a case follows that of the mother. Thus, where an Englishman domiciled in Guernsey, died there, and the widow came to and took up her residence in England, bringing her children with her; it was held, that the succession to the personal property of two of her children, who died there at an early age, was to be governed by the law of England, there being no ground to impute the removal to fraudulent intention (*l*). It has been suggested that a widow on re-marriage loses the power to change the domicil of the infant children of her former marriage, and that they

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(*d*) *Robins* v. *Dolphin*, 1 Sw. & Tr. 37, S.C. *Dolphin* v. *Robins*, 7 H. L. C. 390; *Whitcomb* v. *Whitcomb*, 2 Curt. 351; *Yelverton* v. *Yelverton*, 1 Sw. & Tr. 574; *Re Daly's Settlement*, 25 Bea. 456; *Dalhousie* v. *M'Douall*, 7 Cl. & F. 817; *Bell* v. *Kennedy*, L. R. 1 H. L. Sc. 307; *Harvey* v. *Farnie*, 8 A. C. 43. As to the effect of the Naturalization Act, 1870, see *In b. Brown-Séquard*, 70 L. T. 811. It is possible that mere cohabitation might be sufficient to change a woman's domicil: see *Turner* v. *Thompson*, 13 P. D. 37, where the marriage was voidable.

(*e*) *Williams* v. *Dormer*, 2 Rob. 505.

(*f*) *Warrender* v. *Warrender*, 2 Cl. & F. 488; *Re Daly's Settlement*, 25 Bea. 466. See *Re Martin*, [1900] P. 211.

(*g*) *Le Sueur* v. *Le Sueur*, 1 P. D. 139; *Dolphin* v. *Robins*, 7 H. L. C., at p. 420; *Re Mackenzie*, [1911] 1 Ch. 578, at p. 594; *Lord Advocate* v. *Jaffrey*, [1921] 1 A. C. 146.

(*h*) [1926] A. C. 444.

(*k*) *Dalhousie* v. *M'Douall*, 7 Cl. & F. 817; *Munro* v. *Munro*, 7 Cl. & F. 842; *In b. Patten*, 6 Jur. (N.S.) 151. As to the effect of the Legitimacy Act, 1926, see *ante*, p. 17.

(*l*) *Potinger* v. *Wightman*, 3 Mer. 67; *Johnstone* v. *Beattie*, 10 Cl. & F., at pp. 66, 138.

consequently retain the domicil which their mother had immediately before her re-marriage. But the true rule has been laid down by Stirling, J. (*m*), namely, that the change in the domicil of a fatherless infant, which may follow from a change of domicil on the part of the mother, is not a necessary consequence of the change in the mother's domicil, but is the result of the exercise by her of a power vested in her for the welfare of the infant, which, in their interest, she may abstain from exercising, even when she changes her own domicil, and the better view seems to be that this power is not lost by her re-marriage.

It is doubtful whether a guardian can change an infant's domicil (*n*).

Lunatic.

If a man at the time he attains his majority is of unsound mind, and remains in that state continuously up to the time of his death, the incapacity of minority is in effect continued, so as to confer upon the father the right of choice in the matter of domicil for his son, and a change of domicil by the father will usually produce a similar change of domicil as regards the son. In order that such a change of domicil may be produced, it is necessary that the son should be under the control of his father (*o*).

Conflict of laws as to domicil. Doctrine of *Renvoi*.

When a British subject takes up his permanent residence in a country, the laws of which do not recognise domicil as governing the devolution of property after death, or which do not permit a domicil to be acquired by mere residence, the question arises whether English law will treat him as having acquired a domicil in that country. It is difficult, if not impossible, to reconcile the decisions on this question. The authority of *Collier* v. *Rivaz* (*p*) has been shaken by *Bremer* v. *Freeman* (*q*), the case which led to the passing of Lord Kingsdown's Act. In *Re Trufort* (*r*) a British subject became a Swiss subject, and afterwards went to reside in France, where, according to English law (*s*), he was domiciled at his death;

(*m*) *Re Beaumont*, [1893] 3 Ch. 490.

(*n*) *Per* Wickens, V.-C., in *Douglas* v. *Douglas*, L. R. 12 Eq., at p. 625. It seems that, by the law of Scotland, an infant aged fourteen years may choose his own domicil: *Urquhart* v. *Butterfield*, 37 Ch. D. 357.

(*o*) *Sharpe* v. *Crispin*, L. R. 1 P. & D. 611.

(*p*) 2 Curt. 855.

(*q*) 10 Moo. P. C. 306, *ante*, p. 11. See the case of *Gosling* v. *Viditz*, referred to in the Law Magazine, Nov., 1909, p. 34, and the Law Quarterly Review, xxvi, p. 227.

(*r*) 36 Ch. D. 600.

(*s*) It does not appear that the deceased had a domicil in France according to French law.

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according to French law, the succession to his personal property was governed by the law of Switzerland: the English Court accepted this view, and distributed the property in accordance with a decision of the Swiss Courts, which was accepted as binding on the English Court. There was, therefore, no conflict of laws (*t*). In *Hamilton* v. *Dallas* (*u*) it was held that the deceased had acquired a "*de facto* domicil" in France, although he had not complied with the requirements of the Code Napoleon.

Re Johnson.

In *Re Johnson* (*x*), on the other hand, it was held that the moveable property of a British subject is not distributable in accordance with the law of his domicil, if he has resided in a country the law of which does not recognise domicil for purposes of succession. In that case the law of Baden (where the testatrix had lived for many years) treated nationality as governing the question of succession, and her moveable property was distributed by our Courts in accordance with the law of Malta, which was her domicil of origin. The case of *Re Johnson* has been much discussed.

Re Annesley.

In *Re Annesley* (*y*) the testatrix was domiciled in France. According to French municipal law, the law applicable in the case of a foreigner, not legally domiciled in France, is that of that person's nationality. The testatrix was a British subject. English law refers the question back to the law of the domicil, that is, French law; the result of the expert evidence was that the French Courts would apply French municipal law, under which the testatrix could only dispose of one-third of her property by will. Russell, J., after arriving at this result, then proceeded as follows: "Speaking for myself, I should like to reach the same conclusion by a much more direct route along which no question of *renvoi* need be encountered at all. When the law of England requires that the personal estate of a British subject who dies domiciled, according to the requirements of English law, in a foreign country, shall be administered in accordance with the law of that country, why should this not mean in accordance with the law which that country would apply, not to the *propositus*, but to its own nationals legally domiciled there? In other words, when we say that French law applies to the administration of the personal estate of an Englishman who dies domiciled in France, we mean that French municipal law which France applies in the case of Frenchmen. This appears to me

(*t*) As to the bearing of this case on the doctrine of *Renvoi*, see Dicey, 718 *et seq.*, where attention is drawn to the distinction between *renvoi* as meaning "remittal," and *renvoi* as meaning "transmission."

(*u*) 1 Ch. D. 257.

(*x*) [1903] 1 Ch. 821.

(*y*) [1926] Ch. 962. The case of *Re Bowes*, 22 T. L. R. 711, is of no value as a decision: see [1926] Ch., at p. 706.

a simple and rational solution which avoids altogether that endless oscillation which otherwise would result from the law of the country of nationality invoking the law of the country of domicil, while the law of the country of domicil in turn invokes the law of the country of nationality, and I am glad to find that this simple solution has in fact been adopted by the Surrogates Court of New York" (*z*).

It is much to be hoped that this view (which accords with that of Mr. Dicey (Law Quarterly Review, vol. xix, 244), and of Mr. C. Sweet (in the sixth edition of the book) will be adopted.

It sometimes happens that a person has a French domicil according to English law, and an English domicil according to French law. In such a case a will executed by him according to the requirements of English law may be proved in England in order to enable the French Courts to give effect to it (*a*).

(*z*) [1926] Ch., at pp. 708, 709.
(*a*) *In b. Brown-Séquard*, 70 L. T. 811.

CHAPTER II.

FORM AND CHARACTERISTICS OF THE INSTRUMENT.

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"Will."

I.—Preliminary.—Mr. Jarman points out (*a*) that "in a general and comprehensive sense, a will consists of the aggregate of all the papers through which it is dispersed"; or, as it has also been put, a will is the aggregate of a man's testamentary intentions so far as they are manifested in writing, duly executed according to the statute (*b*). In this sense, therefore, it includes a codicil. But sometimes the term "will" is used as opposed to "codicil," the distinction between the two being that the will is the principal, and the codicil the accessory; a codicil is a supplement by which the testator alters or adds to his will. But these distinctions are to some extent questions of terminology, for a man may execute two or more instruments, each purporting to be a will (*c*), and together constituting one will (*d*). And on the other hand, if he leaves nothing but an instrument described as a codicil, it may take effect as a will (*e*). The distinction is of importance where a man revokes or revives his "will," for the question arises whether he thereby intends to revoke or revive a codicil to it (*f*). And where a will consists of two or more documents, a person who attests one of them does not forfeit a

"Codicil."

(*a*) First edition, p. 172; cited again *post*, Chap. VII.

(*b*) *Per* Lord Penzance in *Lemage* v. *Goodban*, L. R. 1 P. & D. 57; cited by Fry, J., in *Green* v. *Tribe*, 9 Ch. D. 231. See *Re Nicholls*, [1921] 2 Ch. 11, where the endorsement on an envelope and the document enclosed together made one testamentary disposition.

(*c*) As *In b. Claus*, 31 W. R. 924, where a man made two wills, one limited to property vested in him as trustee, and the other disposing of his own property. As to wills disposing of property in different countries, see *ante*, p. 15 and *post*, p. 39.

(*d*) See the quotation from *Douglas-Menzies* v. *Umphelby*, *post*, p. 40. and see *post*, Chap. VII (revocation by subsequent inconsistent will, etc.).

(*e*) *Post*, Chap. VII (whether a codicil is revoked by destruction of will).

(*f*) *Post*, Chap. VII.

benefit given him by another, if the latter is separately executed and attested (*g*).

Ambulatory nature of wills.

II.—What Instruments are Testamentary.—" A will," says Mr. Jarman (*h*), " is an instrument by which a person makes a disposition (*i*) of his property to take effect after his decease (*k*), and which is *in its own nature* ambulatory and revocable during his life (*l*). It is this ambulatory quality which forms the characteristic of wills; for, though a disposition by deed may postpone the possession or enjoyment, or even the vesting, until the death of the disposing party, yet the postponement is in such case produced by the express terms, and does not result from the nature, of the instrument. Thus, if a man by deed, limit lands to the use of himself for life, with remainder to the use of A in fee, the effect upon the usufructuary enjoyment is precisely the same as if he should, by his will, make an immediate devise of such lands to A in fee; and yet the case fully illustrates the distinction in question; for, in the former instance, A, *immediately* on the execution of the deed, becomes entitled to a remainder in fee, though it is not to take effect in possession until the decease of the settlor, while, in the latter, he would take no interest whatever until the decease of the testator should have called the instrument into operation."

Appointment by will of executors or guardians.

It will be noticed that Mr. Jarman's definition includes only wills which dispose of property, and his treatment of the subject, therefore, does not extend to testamentary dispositions of a personal character, such as the question in what manner and by what words a testator may appoint executors (*m*) or

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(*g*) *Post*, p. 80.

(*h*) First edition, p. 11. It will be remembered that a man's will may be contained in several testamentary writings: *In b. Todd*, [1926] P. 173.

(*i*) Where one by will said, " I propose to give the residue by codicil, or otherwise to allow the same to go to my next-of-kin according to the statutes for the distribution of the estates of intestates," and he left no codicil, he was held not to have disposed of the residue: *Ash* v. *Ash*, 33 Bea. 187. And if a will altogether fails to take effect by reason of the death of the sole executor and legatee in the lifetime of the testator, there is an intestacy: *Re Ford*, [1902] 2 Ch. 605.

(*k*) It need not take effect immediately after his decease: *In b. Newns*, 7 Jur. (N.S.) 688.

(*l*) As to deeds and other dispositions which are not testamentary, although they only take effect after the donor's death, see *Fletcher* v. *Fletcher*, 4 Ha. 67; *Hughes* v. *Stubbs*, 1 Ha. 476.

(*m*) As to the words which will constitute a person " executor according to the tenor," see *In b. Montgomery*, 5 N. of C. 99; *In b. Lowry*, L. R. 3 P. & D. 157; *In b. Allam*, 66 L. T. 382; *In b. Wilkinson*, [1892] P. 227; *In b. Cook*, [1902] P. 114; *In b. Pryse*, [1904] P. 301; and other cases cited in Robbins & Maw, p. 3. As to the will of a foreigner, see *In b. Von Linden*, [1896] P. 148. As to the appointment of a corporation as executor, see *In b. Hunt*, [1896] P. 288; *In b. Martin*, 90 L. T. 264, and section 161 of the Judicature Act, 1925. As to the appointment of different executors for different parts of the testator's estate, or for different countries, or in different contingencies,

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guardians (*n*). And although a will is an ambulatory document a clause may be referred to to prove a fact, such as that the testator recognised that he held certain property upon certain trusts (*nn*).

Religious education.

A testator may give directions as to the religion in which he wishes his children to be brought up (*o*).

These matters are dealt with in special text-books, and are therefore not discussed in detail here.

Attempts to make will irrevocable.

As a will is of its own nature revocable, a declaration by a testator that his will is irrevocable is inoperative (*p*). A covenant not to revoke a will cannot be specifically enforced, but an action for damages will lie for the breach of it, unless the will was revoked by the marriage of the covenantor (*q*).

Contract to leave property by will.

As a general rule, a contract to bequeath a legacy or to leave property by will cannot be specifically enforced, and only gives rise to an action for damages (*r*), but in certain cases contracts of this kind have been given effect to specifically. Thus a covenant (or apparently any contract for valuable consideration) to devise land in a particular way can be specifically enforced against the testator's heir at law, or persons claiming under him as volunteers (*s*). And if during his lifetime the testator conveys the land to a third person, an immediate right of action to recover damages accrues to the promisee (*t*).

Covenant to leave whole of testator's property—how enforced.

As a general rule, a covenant by a man to leave by will all his property, or a share of all his property, in a certain way, only applies to such property as he dies possessed of, and does not

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see *Velho* v. *Leite*, 33 L. J. P. 107; Robbins & Maw, 5; *In b. Langford*, L. R. 1 P. & D. 458. As to the revocation of an appointment of executors, see *post*, p. 169.

(*n*) As to what words will amount to an appointment of guardian, see *Bridges* v. *Hales*, Mos. 109; *Miller* v. *Harris*, 14 Sim. 540; *Morgan* v. *Hatchell*, 24 L. J. Ch. 135; *In b. Morton*, 33 L. J. P. 87; *Re G.*, [1892] 1 Ch. 292.

(*nn*) *Re Northcliffe*, [1925] Ch. 651.

(*o*) *Re Scanlan*, 40 Ch. D. 200. It is hardly necessary to say that such a direction is not binding on the Court: *Andrews* v. *Salt*, L. R. 8 Ch. 622. Nor is a direction by a testator that his estate shall be administered by the Court: *Re Stocken*, 38 Ch. D. 319.

(*p*) *Vynior's Case*, 8 Co. Rep. 82a.

(*q*) *Robinson* v. *Ommaney*, 23 Ch. D. 285.

(*r*) *Hammersley* v. *De Biel*, 12 Cl. & F. 45. The contract must be definite: *Cochran* v. *Graham*, 19 Ves. 63; *Re Fickus*, [1900] 1 Ch. 331, where the earlier cases are referred to. The liability is not necessarily discharged by a devise or bequest: *Eyre* v. *Monro*, 3 K. & J. 305; *Graham* v. *Wickham*, 1 D. J. & S. 474. As to the effect of the covenantee dying in the testator's lifetime, see *Jones* v. *How*, 7 Ha. 267. As to such a covenant being satisfied by a bequest of a different nature, or by a distributive share under an intestacy, see *Goldsmid* v. *Goldsmid*, 1 Sw. 211, and Mr. Swanston's note; *Salisbury* v. *Salisbury*, 6 Ha. 526; and *post*, p. 1139.

(*s*) *Goylmer* v. *Paddiston*, 2 Ventr. 353; *S. C.* as *Goilmere* v. *Battison*, 1 Vern. 48; *Coverdale* v. *Eastwood*, L. R. 15 Eq. 121.

(*t*) *Synge* v. *Synge*, [1894] 1 Q. B. 466. See *Humphreys* v. *Green*, 10 Q. B. D. 148; *Maddison* v. *Alderson*, 8 A. C. 467.

prevent him from disposing during his lifetime of any part of his property (*u*). The Courts have, however, in certain cases defeated attempts to evade such a covenant. Thus in *Lewis* v. *Madocks* (*x*), an agreement to settle personal property was not allowed to be evaded by investing it in the purchase of land. Again, in *Fortescue* v. *Hennah* (*y*), a father covenanted on the marriage of one of his two daughters that on his death all his property which he should die possessed of should be held in trust for his two daughters in equal shares. He afterwards disposed of part of his property in favour of various persons, reserving a life interest for himself. Grant, M.R., said that although a covenant of this kind did not prevent the testator from making *bona fide* dispositions of his property during his life, he could not defeat it by dispositions which were in effect testamentary, though not such in point of form; and he held that the property of which the testator reserved the life interest was, for the purposes of the covenant, to be considered as part of the property which he possessed at the time of his death. The case of *Logan* v. *Wienholt* (*z*) seems to have been decided on the same principle.

Appointment under special power.

A covenant to bequeath a certain sum is not satisfied by a testamentary appointment of that sum under a special power, although expressed to be made in satisfaction of the covenant (*a*).

Gift may fail by lapse, etc.

A legacy bequeathed in pursuance of a covenant is on the same footing as ordinary legacies with regard to lapse, debts, etc. (*b*).

Covenant to exercise power.

As to the validity of covenants to exercise testamentary powers, see Chapter XXIII.

Evidence of *animus testandi*, when requisite.

It is essential to the validity of a will that at the time of its execution the testator should know and approve of its contents (*c*). And whenever any ground for suspicion exists, the burden of proving that the will was the voluntary and conscious act of the testator lies on him who propounds the will (*d*). The degree of proof required may vary with the circumstances of the

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(*u*) *Needham* v. *Kirkman*, 3 B. & Al. 531; *Needham* v. *Smith*, 4 Russ. 318; *Re Brookman's Trust*, L. R. 5 Ch. 182; *Coverdale* v. *Eastwood*, L. R. 15 Eq. 121. If the testator bequeaths a legacy to the persons entitled to the benefit of the covenant, a case of election arises: see *Bennett* v. *Houldsworth*, 6 Ch. D. 671, and other cases cited *post*, p. 1131. As to the inexpediency of relying on a covenant of this kind, see Davidson, Conv. III, 805, n. As to probate duty, see *Att.-Gen.* v. *Murray*, 20 L R. Ir. 124.

(*x*) 8 Ves. 150.

(*y*) 19 Ves. 67, following *Jones* v. *Martin*, 5 Ves. 266, n.

(*z*) 1 Cl. & F. 611.

(*a*) *Graham* v. *Wickham*, 1 D. J. & S. 474.

(*b*) *Re Brookman's Trust*, L. R. 5 Ch. 182; *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18.

(*c*) *Hastilow* v. *Stobie*, L. R. 1 P. & D. 64.

(*d*) *Sutton* v. *Sadler*, 3 C. B. (N.S.) 87; *Cleare* v. *Cleare*, L. R. 1 P. & D. 655; *Fulton* v. *Andrew*, L. R. 7 H. L. 448; *Tyrrell* v. *Painton*, [1894] P. 151; *post*, p. 53.

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case. If a person writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the Court, and it ought not to pronounce the will valid unless the suspicion is removed and it is judicially satisfied that the paper propounded expresses the true will of the deceased (*e*).

Effect of mistake.

A document which is in form a testamentary disposition by a person competent to make a will, and executed with all due formalities, may nevertheless be proved not to be the will of the person who signed it, on the ground that the requisite *animus testandi* was wanting. Accordingly, if the execution of a will has been induced by mistake, probate of it will be refused. Thus, where two sisters made mutual wills in favour of each other, the words *mutatis mutandis* being precisely the same, and by mistake each signed the will of the other, both wills were held invalid (*f*). "The presumption is that the words which have been read over to and then signed by a capable testator as his will do represent his will, his whole will, and nothing but his will. And if it is said that they represent his will and something more, then before that something more can be rejected as not being his will, it must be established beyond all doubt that it is not his will" (*g*). "If a testator knowing the words intended to be used approves them and executes the will, then he knows and approves the contents of his will, and all the contents, even though such approval may be due to a mistaken belief of his own, or to honestly mistaken advice from others, as to their true meaning and legal effect" (*h*). But if words have been inserted in a will by mistake of the person who prepared it, and the attention of the testator is not called to them, they will be omitted from the probate (*i*), although the right words cannot be inserted (*k*). The Court of construction, however, although it

(*e*) *Barry* v. *Butlin*, 2 Moo. P. C. 480; *Brown* v. *Fisher*, 63 L. T. 465; *Tyrrell* v. *Painton*, [1894] P. 151; *Finney* v. *Govett*, 25 T. L. R. 186; *Low* v. *Guthrie*, [1909] A. C. 278; and see below, pp. 54 *seq.* As to the costs of a person who opposes a will, see *Wilson* v. *Bassil*, [1903] P. 239; *Spiers* v. *English*, [1907] P. 122, and *Re Plant*, [1926] P. 139.

(*f*) *In b.*——, 14 Jur. 402; *In b. Nosworthy*, 11 Jur. (N.S.) 570; *In b. Hunt*, L. R. 3 P. & D. 250; *Estate of Meyer*, [1908] P. 353.

(*g*) *Gregson* v. *Taylor*, [1917] P. 256, at p. 261.

(*h*) *In b. Beech*, [1923] P. 46, at pp. 53, 54.

(*i*) *Hippesley* v. *Homer*, T. & R. 48, n.; *Trimlestown* v. *D'Alton*, 1 D. & Cl. 85; *In b. Fairburn*, 4 N. of Cas. 478; *In b. Wray*, Ir. R. 10 Eq. 267; *In b. Duane*, 2 Sw. & Tr. 590; *In b. Oswald*, L. R. 3 P. & D. 162; *Morrell* v. *Morrell*, 7 P. D. 68; *In b. Boehm*, [1891] P. 247; *In b. Gordon*, [1892] P. 228; *In b. Moore*, *ib.* 378; *In b. Reade*, [1902] P. 75; *Brisco* v. *Baillie Hamilton*, *ib.* 234; *In b. Snowden*, 75 L. T. 279; *Vaughan* v. *Clerk*, 87 L. T. 144; *In b. Wrenn*, [1908] 2 Ir. R. 370. See also the cases cited *post*, p. 34.

(*k*) *In b. Schott*, [1901] P. 190 (see also *In b. Walkeley*, 69 L. T. 419), overruling *In b. Bushell*, 13 P. D. 7; *In b. Huddleston*, 63 L. T. 255. As to the effect of the omission on what remains, see *Rhodes* v. *Rhodes*, 7 A. C., at p. 198. In *In b. Morony*, 1 Ir. L. R. 483, words which had been omitted by mistake were supplied by the Court of Probate, see *post*, p. 556, n. (*b*).

cannot (in the exercise of its ordinary jurisdiction) change the words of a will (*l*), may construe the will on the assumption that words have been inserted or omitted by mistake (*m*).

In *In b. Douce* (*n*), a man named Thomas Douce, who could neither read nor write, requested A to prepare a will for him; A did so, but erroneously described the testator throughout as "John Douce." Thomas Douce executed it by making his mark, and it was duly attested. It was clear from the terms of the will and the surrounding circumstances that the will was that of Thomas Douce, and it was admitted to probate as his will. Here, of course, the *animus testandi* was present.

Mistaken reference to revoked will.

But where a testator makes two wills, the second of which revokes the first, and then makes a codicil referring to the first will, parol evidence is not admissible to show that this was a mistake, and that he meant to refer to the second will (*o*). By consent, however, the Court of Probate can allow the mistaken reference to be omitted from the probate (*p*).

Gift inserted by mistake.

Nor is evidence admissible to show that a legacy was inserted in the will by mistake, if there is a person in existence answering the description of the legatee (*q*). And as a general rule, a bequest which is induced by a mistake on the part of the testator is nevertheless valid (*r*).

Sham will.

From the general principle that *animus testandi* is essential to the validity of a will, it follows that where a document purporting to be a will is deliberately executed with all due formalities, yet if it is intended by the person executing it not to have any testamentary operation, but is executed for some collateral object (*e.g.*, to be shown to another person to induce him to comply with the pretended testator's wish), it is a nullity, and probate will be refused (*s*).

Fraud, undue influence, etc.

A will may also be invalid on the ground that its execution was induced by fraud (*t*), coercion, or undue influence (*u*). In many of these cases there is also present the element of physical

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(*l*) See *Re Bywater*, 18 Ch. D. 17.

(*m*) See *post*, p. 550 and p. 556.

(*n*) 8 Jur. (N.S.) 723; better reported 31 L. J. P. 172, s.n. *In b. Douse*.

(*o*) *In b. Chapman*, 8 Jur. 902, *post*, p. 180.

(*p*) *In b. Gordon*, [1892] P. 228; *In b. Reade*, [1902] P. 75.

(*q*) *Stringer* v. *Gardiner*, 4 De G. & J. 468; *Re Nunn's Trusts*, L. R. 19 Eq. 331. Where there is a latent ambiguity, evidence is, of course, admissible: see *post*, pp. 492 *seq.*

(*r*) See *Re Dyke*, 44 L. T. 568, cited *post*, p. 1502.

(*s*) *Lister* v. *Smith*, 33 L. J. Pr. 29.

(*t*) *Goss* v. *Tracy*, 1 P. W. 287; *Doe* v. *Allen*, 8 T. R. 147; *Browning* v. *Budd*, 6 Moo. P. C. 435; *Rhodes* v. *Rhodes*, 7 A. C., at p. 198; *Finney* v. *Govett*, 25 T. L. R. 186.

(*u*) *Stulz* v. *Schœfle*, 16 Jur. 909; *Hall* v. *Hall*, L. R. 1 P. & D. 481; *Parfitt* v. *Lawless*, L. R. 2 P. & D. 462; *Betts* v. *Doughty*, 5 P. D. 26; *Wingrove* v. *Wingrove*, 11 P. D. 81; *Boyse* v. *Rossborough*, 6 H. L. C. 2; *Jones* v. *Godrich*, 5 Moore P. C. 16; *Baudains* v. *Richardson*, [1906] A. C. 169; *Estate of Austin*, 73 Sol. J. 545.

CHAPTER II.

or mental weakness (*x*). So if a portion of a will was inserted by fraud or undue influence, it may be omitted from the probate (*y*).

Improper omission of legacies.

In *Mitchell* v. *Gard* (*z*), the residuary legatee, who prepared the will, intentionally omitted some legacies which he had been directed to insert, and the omission was not noticed by the testatrix: it was held that the will was nevertheless valid. Probably in such a case the residuary legatee would be held to be a trustee for the disappointed legatees.

Will prepared by another.

If a man requests another to draw up a will for him without saying what he desires it to contain, and executes it without knowing its contents, the will is bad (*a*); but a will prepared in good faith in pursuance of the testator's definite instructions is valid, if at the time of execution he believes it to have been so prepared, although he may then be mentally incapable of understanding it (*b*). And if in drawing up a will by the instructions of the testator, the draughtsman, without reason or special directions, but in good faith, introduces words the effect of which the testator does not intelligently appreciate when the will is read over to him, they must stand as part of the will (*c*); the rule is the same even if the testator asks to have them explained, and their effect is, in good faith, misrepresented to him (*d*). But if they were inserted by mistake, and there is no clear evidence that they were really brought to the mind of the testator, they will be omitted from the probate (*e*).

Presumption from reading over will before execution.

As a general rule, in the absence of suspicious circumstances, the fact that a will has been read by, or read over to, the testator, affords a strong presumption that he understood and approved of its contents (*f*); but there is no inflexible rule on the subject (*g*).

Form of wills.

As Mr. Jarman points out (*h*): "The law has not made

(*x*) See *Hampson* v. *Guy*, 64 L. T. 778, and the cases cited below, p. 54.

(*y*) *Morrell* v. *Morrell*, 7 P. D., at p. 70; *Farrelly* v. *Corrigan*, [1899] A. C. 563; and the other cases cited below, p. 55. The decision in *Fulton* v. *Andrew* (L. R. 7 H. L. 448) seems to have rested on fraud. There appears to be some doubt whether part of a will can be omitted if the omission would alter the sense of what remains: see *Rhodes* v. *Rhodes*, 7 A. C., at p. 198.

(*z*) 33 L. J. P. 7.

(*a*) *Hastilow* v. *Stobie*, L. R. 1 P. & D. 64.

(*b*) *Parker* v. *Felgate*, 8 P. D. 171. Where the testator is deaf and dumb, strict evidence that his wishes were correctly interpreted is required: *In b. Owston*, *In b. Geale*, *post*, p. 53, n. (*p*).

(*c*) *Rhodes* v. *Rhodes*, 7 A. C. 192; *Guardhouse* v. *Blackburn*, L. R. 1 P. & D. 109; *In b. Davy*, 29 L. J. P. 161; *Harter* v. *Harter*, L. R. 3 P. & D. 11; *Beamish* v. *Beamish*, [1894] 1 Ir. R. 7.

(*d*) *Collins* v. *Elstone*, [1893] P. 1.

(*e*) *Brisco* v. *Baillie Hamilton*, [1902] P. 234.

(*f*) *Guardhouse* v. *Blackburn*, *supra*; *Cleare* v. *Cleare*, L. R. 1 P. & D. 655; *Beamish* v. *Beamish*, [1894] 1 Ir. R. 7.

(*g*) *Fulton* v. *Andrew*, L. R. 7 H. L. 448; *Tyrrell* v. *Painton*, [1894] P. 151; *Garnett-Botfield* v. *Garnett-Botfield*, [1901] P. 335.

(*h*) First edition, p. 11.

requisite, to the validity of a will, that it should assume any particular form, or be couched in language technically appropriate to its testamentary character. It is sufficient that the instrument, however irregular in form or inartificial in expression, discloses the intention of the maker respecting the posthumous destination of his property; and, if this appear to be the nature of its contents, any contrary title or designation which he may have given to it will be disregarded (*i*).

Instruments in the form of deeds, agreements, etc., held to be testamentary.

Instrument commencing as an indenture, but ending as a will.

"Thus (*k*), a deed-poll, and even an agreement or other instrument between parties, has repeatedly been held to have a testamentary operation. As, in *Hixon* v. *Wytham* (*l*), where A by indenture made between him on the one part, and B and C of the other part, in consideration of £5, bargained and sold to them certain lands in trust to sell after his decease, and directed the money to arise by the sale to be employed in the payment of certain sums therein mentioned, and the rest thereof, and all his personal estate, he gave and bequeathed (for the language was here changed to the first person) in favour of certain persons. A made B and C executors of *his will*; and signed, sealed, published and declared the instrument as his will in the presence of several witnesses. The Court declared this to be a good will.

Instrument entitled "Articles of Agreement."

"So, in *Green* v. *Proude* (*m*), where, by instrument entitled 'Articles of Agreement,' made between A of the one part, and B of the other part: it was agreed between them that A, being sick in body, gives, etc.; in consideration whereof B promised to pay several sums of money. The instrument concluded in the ordinary manner of deeds, *i.e.*, 'in witness whereof the parties have hereunto interchangeably set their hands and seals.' This instrument was delivered as a deed; but it was held to be testamentary, and as such revocable, and the Court seems to have been influenced by the circumstance that the person who prepared it was instructed to make a will."

Mr. Jarman also cites *Peacock* v. *Monk* (*n*), *Tomkyns* v.

(*i*) This passage was cited with approval, as correctly stating the law on this subject, by Lord Selborne, C., in *Whyte* v. *Pollok*, 7 A. C., at p. 409.

(*k*) *West's Case*, Mo. 177, pl. 314; *Manly* v. *Lakin*, 1 Hagg. 130; *In b. Dunn*, *ib.* 488; *Thorold* v. *Thorold*, 1 Phillim. 1; *In b. Montgomery*, 5 N. of C. 99; *Henderson* v. *Farbridge*. 1 Russ. 479; *Rigden* v. *Vallier*, 2 Ves. Sen. 252; *In b. Morgan*, L. R. 1 P. & D. 214; *Milnes* v. *Foden*, 15 P. D. 105. In *Consett* v. *Bell*, 1 Y. & C. C. C. 569, the deed was apparently not testamentary. See also *Dillon* v. *Coppin*, 4 My. & Cr. 647; *Hope* v. *Harman*, 11 Jur. 1097; *In b. Halpin*, Ir. R. 8 Eq. 567.

(*l*) 1 Ch. Cas. 248; *S. C.* Finch, 195.

(*m*) 3 Keb. 310; *S. C.* 1 Mod. 117.

(*n*) 1 Ves. Sen. 127; Belt's Suppl. 82. The deed in this case contained a clause showing that the instrument was designed to operate in the donor's lifetime. In a much earlier case (*Audley's Case*, 4 Leon. 166) it appears to have been considered as conclusive against the construing of an instrument as a will, that by it an estate was to be taken by the maker, "who could not take by his own will." From Lord Hardwicke's observations in *Peacock*

Ladbroke (*o*), *Hog* v. *Lashley* (*p*), and *Habergham* v. *Vincent* (*q*), as illustrating the same principle. In *Fielding* v. *Walshaw* (*r*), a deed of gift referring to "sick and funeral moneys" was held to be testamentary, although it gave to the donor's wife certain benefits during his life, and although he orally declared that it was not intended to be a will.

Att.-Gen. v. *Jones.* Whether property professedly settled by deed was liable to legacy duty.

The question, whether an instrument in the form of a deed operated as a will, was much discussed in *Att.-Gen.* v. *Jones* (*s*), where A, by indenture dated March 25, 1813, assigned, for a nominal pecuniary consideration, certain leasehold property to C and D; also certain stock, and all other his personal estate, upon trust for himself for life, and after his decease, for B (an illegitimate daughter). The instrument reserved to A a power of revocation by deed or will. By will, dated April 16, 1813, A confirmed the deed except as to certain particulars, which he specified, and appointed the same persons as were trustees in the deed executors. A did not transfer the stock, or part with the possession of the assigned property, or even communicate to the trustees the existence of the deed, which he retained in his own custody. The question was, whether the property assigned by it was liable to the legacy duty; and three of the Barons of the Exchequer (*dissentiente* Wood, B.) decided in the affirmative.

Tompson v. *Browne.* Settlement reserving life interest to settlor, with power of revocation, held that the property was not liable to legacy duty.

This decision has been generally condemned, and may be regarded as overruled. In *Tompson* v. *Browne* (*t*), the question raised was whether an assignment by deed of personal property, reserving a life interest to the assignor, and giving him a power of revocation, was not testamentary, and the fund accordingly subject to legacy duty. The affirmative was attempted to be maintained on the authority of *Att.-Gen.* v. *Jones*; but Sir C. C. Pepys, M.R., decided that the legacy duty did not attach. "The decision in *Att.-Gen.* v. *Jones*," he said, "seems to have proceeded upon the ground that, under the circumstances of that case, nothing passed from the maker of the instrument, so as to entitle any other person to interfere with his property in his lifetime. If there be anything in that decision to support the notion, that where a person by deed settles property to his own

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v. *Monk* it would seem that he thought that an instrument might be testamentary for some purposes but not for others; as to which, see *Doe* v. *Cross*, 8 Q. B. 714, stated *post*, p. 41.

(*o*) 2 Ves. Sen. 591.

(*p*) 6 Bro. P. C. 577, stated 3 Hagg. 415, n. So an instrument headed "Notes of intended settlement by W. W.," and containing sufficient words of bequest, was held to be testamentary by D. P. in *Whyte* v. *Pollok*, L. R. 7 A. C. 400.

(*q*) 2 Ves. Jun. 204; 4 Bro. C. C. 355.

(*r*) 27 W. R. 492.

(*s*) 3 Price, 368.

(*t*) 3 My. & K. 32.

use during his life, and after his decease for the benefit of other persons, a power of revocation reserved in such a deed alters the character of the instrument, and renders it testamentary, and consequently subject to legacy duty, I can only say that if this were law, a great number of transactions, of which the validity has never been doubted, would be liable to be impeached."

Although the remarks of the M. R. are expressed with great caution, they leave no doubt of his opinion of *Att.-Gen.* v. *Jones*, and when that case was cited to Lord St. Leonards in D. P. (*u*), he said : " That case is quite wrong."

Instrument sealed, stamped, and registered, not testamentary.

In *Marjoribanks* v. *Hovenden* (*x*), an instrument commencing with a recital, and having an attestation clause, like a deed-poll, and sealed, stamped, and registered, was held by the same learned Lord not to be invested with a testamentary character by the mere nature of the power (a power to appoint by will, misrecited as a power to appoint by deed or will) under which it purported to be made. The fact of registration as a deed appears to have been deemed almost conclusive against its testamentary character.

Rule in Ecclesiastical Courts as to instruments testamentary in substance but not in form.

The Ecclesiastical Judges (before whom, of course, questions of this kind were formerly most frequently agitated) acted fully up to the principle which regards as testamentary any instrument that is designed not to take effect until the maker's decease, though assuming the form of a disposition *inter vivos*; and more especially if it be incapable of operation in the intended form (*y*); and accordingly, in repeated instances, probate was, under the old practice, granted of such irregular documents as the assignment of a bond by indorsement (*z*), receipts for stock and bills indorsed (*a*), a letter (*b*), marriage articles (*c*), and promissory notes, and notes payable by executors, in order to avoid the legacy duty (*d*), and cheques on a banker (*e*), though the testator

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(*u*) *Brown* v. *Adv.-Gen.*, 1 Macq. Sc. Ap. p. 85. See also *Alexander* v. *Brame*, 7 D. M. & G. 530; *S. C. nom. Jeffries* v. *Alexander*, 8 H. L. C. 594. At the present time, however, the property would be liable to succession duty : see stats. 16 & 17 Vict. c. 51; 51 Vict. c. 8, s. 21. As to estate duty, see the Finance Act, 1894.

(*x*) 1 Dru. t. Sug. 11.

(*y*) But now that all wills must be attested by two witnesses, the validity of an instrument as an actual disposition of property would, if not so attested, depend on the maintenance of its non-testamentary character : *Mitchell* v. *Smith*, 33 L. J Ch. 596.

(*z*) *Musgrave* v. *Down*, T. T. 1784; cit. 2 Hagg. 247.

(*a*) *Sabine* v. *Goate and Church*, 1782; cit. 2 Hagg. 247.

(*b*) *Drybutter* v. *Hodges*, E. T. 1793; cit. 2 Hagg. 247; *Passmore* v. *Passmore*, 1 Phillim. 216; *Denny* v. *Barton*, 2 Phillim. 575; *In b. Mundy*, 30 L. J. P. 85.

(*c*) *Marnell* v. *Walton*, T. T. 1796; cit. 2 Hagg. 247.

(*d*) *Maxee* v. *Shute*, H. T. 1799; cit. 2 Hagg. 247; and see 4 Ves. 565; *Jones* v. *Nicolay*, 14 Jur. 675; *In b. Marsden*, 1 Sw. & Tr. 542.

(*e*) *Bartholomew* v. *Henley*, 3 Phillim. 317.

made a subsequent will containing a clause revoking any former will or codicil (*f*). Even a list of articles, signed and attested, but without any words of bequest, has been held to be testamentary (*g*). On the same principle, Sir J. Nicholl admitted to probate, as testamentary, the drafts of three bonds, prepared in the lifetime of the deceased, and intended to be executed by him, to the trustees of the marriage settlement of his three daughters, in substitution for legacies which he had, by a revoked will, bequeathed for the benefit of the daughters, and the execution of which bonds was prevented by his death (*h*).

Instruments in the form of present or past gifts held testamentary.

Since the Wills Act, papers, duly signed and attested in accordance with the provisions of the Act, in these words: "I wish A to have my bank book for her own use" (*i*); "I hereby make a free gift to A of the sum deposited," etc. (*k*); "I have given all to A and her sons: they are to pay" certain weekly sums to "X and Y, and to divide the residue among themselves" (*l*); have been held testamentary, chiefly upon collateral evidence, which is always admissible (*m*), that they were executed with that intent. And a paper purporting to be a nomination paper under the Industrial and Provident Societies Act, 1893, may be admitted to probate if duly executed (*n*).

Nominations by Savings Bank Depositors.

It may here be mentioned that under section 3 of the Savings Bank Act, 1887, as amended by section 4 of the Savings Bank Act, 1920, nominations may be made by a depositor not being under sixteen years of age of any person or persons to whom any sum or sums payable to such depositor at his decease is or are to be paid at his decease.

Holders of War Savings Certificates.

There are somewhat similar provisions as to War Savings Certificates under the War Loan (Supplemental Provisions) Act, 1915, as amended by the War Loan Act, 1918 (n^1).

Members of Friendly Societies.

Members of Friendly Societies (n^2) and Industrial

(*f*) *Gladstone* v. *Tempest*, 2 Curt. 650. But the Court of Chancery declared the cheques to be in effect revoked: *Walsh* v. *Gladstone*, 1 Phil. 294.

(*g*) *In b. Lowrey*, 5 N. of C. 619.

(*h*) *Masterman* v. *Maberly*, 2 Hagg. 235.

(*i*) *Cock* v. *Cooke*, L. R. 1 P. & D. 241.

(*k*) *Robertson* v. *Smith*, L. R. 2 P. & D. 43; *In b. Slinn*, 15 P. D. 156.

(*l*) *In b. Coles*, L. R. 2 P. & D. 362. Compare *In b. Webb*, 10 Jur. (N.S.) 709.

(*m*) *In b. English*, 34 L. J. P. 5. And, conversely, evidence may be submitted to show that an instrument apparently testamentary was not executed with that intent. See *Trevelyan* v. *Trevelyan*, 1 Phillim. 149; *Nichols* v. *Nichols*, 2 Phillim. 183; *Lister* v. *Smith*, 3 Sw. & Tr. 282; *In b. Nosworthy*, 11 Jur. (N.S.) 570.

(*n*) *In b. Baxter*, [1903] P. 12.

(n^1) As to this and the Birmingham Municipal Bank, see *Re Kimber*, [1928] 1 Ch. 749. As to Government Annuities see the Government Annuities Act, 1882, s. 6 as amended by the Provident Nominations and Small Intestacies Act, 1883, s. 3.

(n^2) The Friendly Societies Act, 1896, s. 56.

and Provident Societies (n^3) and Trade Unions (n^4) also have powers of nomination of the moneys (not exceeding £100) payable to them at their death.

Deeds *inter partes.*

Instruments in the form of deeds *inter partes*, and purporting to convey property to trustees, but providing that the trusts should not take effect until after the death of the donor, have been held testamentary in the Probate Court (*o*).

Instructions for a will.

A paper merely expressing an intention to instruct a solicitor to prepare a will making a particular disposition of property, will not be admitted to probate in the absence of evidence of intention that such paper should have a testamentary operation (*p*). But instruments headed "Plan of a will" (*q*), or "Heads of a will" (*r*), or "Sketch of my will" (*s*), or "Memorandum of my intended will" (*t*), or "Notes of an intended settlement" (*u*), have been held to operate as valid testamentary dispositions, if duly executed (*x*). But probate was (*y*) refused of an instrument duly executed and attested as a will, but headed "This is not meant as a legal will, but as guide."

It seems that a document commencing "I declare this to be a codicil to my will" may include words written above it on the same sheet of paper (*z*).

It seems that probate may be granted of part only of a document, if the remaining part is not testamentary (*a*).

Incorporated documents.

It will of course be remembered that a document not executed as a will may be incorporated in a duly executed will, so as to form part of it (*b*).

Concurrent wills.

A testator sometimes makes two wills, one relating to his property in England, and the other relating to his property in some foreign country. In such a case, if the wills are wholly

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(n^3) The Industrial and Provident Societies (Amendment) Act, 1913, s. 5. *Eccles Provident etc. Society, Ltd.* v. *Griffiths*, [1912] A. C. 483. *In b. Baxter*, [1903] P. 12.

(n^4) The Trade Union Act (Amendment) Act, 1871, as amended by the Provident Nominations and Small Intestacies Act, 1883.

(*o*) *In b. Morgan*, L. R. 1 P. & D. 214; *Milnes* v. *Foden*, 15 P. D. 105; and see cases, *ante*, p. 44. See also *In b. Knight*, 2 Hagg. 554; *Shingle* v. *Pemberton*, 4 Hagg. 356; both of which cases were before *Tompson* v. *Browne*, stated above, p. 36.

(*p*) *Coventry* v. *Williams*, 3 Curt. 787.

(*q*) *Matthews* v. *Warner*, 4 Ves. 186; 5 Ves. 23.

(*r*) *Bone and Newsam* v. *Spear*, 1 Phillim. 345.

(*s*) *Hattatt* v. *Hattatt*, 4 Hagg. 211.

(*t*) *Barwick* v. *Mullings*, 2 Hagg. 225, and other cases cited *post*, Chap. VI.

(*u*) *Whyte* v. *Pollok*, 7 A. C. 400.

(*x*) *Re Hyslop*, [1894] 3 Ch. 522.

(*y*) *Ferguson-Davie* v. *Ferguson-Davie*, 15 P. D. 109.

(*z*) *Oldroyd* v. *Harvey*, [1907] P. 326. This case is also referred to in Chaps. VI and VII.

(*a*) *Doe* d. *Cross* v. *Cross*, 8 Q. B. 714, stated *post*, p. 41; *Wolfe* v. *Wolfe*, [1902] 2 Ir. R. 246.

(*b*) See *post*, pp. 123 *seq.*

independent, probate may be granted of the English will alone (*c*); or in some cases both wills may be proved (*d*). But if the English will refers to and incorporates the foreign will, or conversely, both wills must be included in the probate (*e*).

In *Re Tamplin* (*f*) a testator made a will disposing of his personal estate and immovable property situate elsewhere than in Russia, and made a separate will disposing only of his immovable property in Russia: it was held that the latter will could not be included in the probate.

Testator can only leave one will.

However many testamentary documents a testator may leave, "it is the aggregate or the net result that constitutes his will, or in other words, the expression of his testamentary wishes. The law, on a man's death, finds out what are the instruments which express his last will. If some extant writing be revoked, or is inconsistent with a later testamentary writing, it is discarded. But all that survive this scrutiny form part of the ultimate will or effective expression of his wishes about his estate. In this sense it is inaccurate to speak of a man leaving two wills; he does leave, and can leave, but one will" (*g*).

Paper testamentary in form.

III.—What Instruments are not Testamentary.—As mentioned above, evidence is admissible to show that an instrument apparently testamentary was not executed with that intent (*h*).

Paper not testamentary in form or substance.

If an instrument is not testamentary either in form or in substance (none of the gifts in it being expressed in testamentary language, or being in terms postponed to the death of the maker), and if no collateral evidence is adduced to show that it was intended as a will, probate will not be granted of it as a testamentary document. In one case (*i*), a minor aged nineteen (at a period when minors of such an age were capable of making wills of personal estate) wrote a paper in these words: "I, A. B., of &c., in the presence of the two under-mentioned witnesses, C. D. of &c., and E. F. of &c., do give all my goods and chattels to M. D. of ——, spinster"; this paper was dated, and witnessed by the two persons referred to in the body of it;

(*c*) *In b. Astor*, 1 P. D. 150, and other cases cited *post*, Chap. VI.

(*d*) *In b. Bolton*, 12 P. D. 202. See also *In b. Bridges*, 65 L. T. 764; *In b. Todd*, [1926] P. 173.

(*e*) *In b. Howden*, 43 L. J. P. 26; *In b. Harris*, L. R. 2 P. & D. 83; *In b. Lockhart*, 69 L. T. 21. For the case of an English testamentary paper (not a will) being incorporated in a foreign will, see *In b. Crawford*, 15 P. D. 212.

(*f*) [1894] P. 39.

(*g*) *Per* Jud. Comm., *Douglas-Menzies* v. *Umphelby*, [1908] A. C., at p. 233. The facts and decision in the case are shortly referred to *post*, p. 518.

(*h*) *Ante*, p. 31.

(*i*) *King's Proctor* v. *Daines*, 3 Hagg. 218; and see *Langley* v. *Thomas*, 26 L. J. Ch. 609.

the Court was of opinion that, as the paper bore upon the face of it no evidence of its being intended to be testamentary, but it rather appeared, both from its contents and the evidence dehors (though the latter was rather conflicting), to have been intended as a present gift, probate ought not to be granted.

So probate was refused of a letter addressed by the deceased to a friend, directing the sale of stock in the public funds, and the distribution of the proceeds, on the ground that it referred to an immediate and not to a posthumous sale (*k*). And in another case, a paper addressed by a testator to his executors was held not to be testamentary, the same not being dispositive in terms, nor shown by extrinsic evidence to have been so intended (*l*). In this case Sir Herbert Jenner observed that there was this distinction in the consideration of papers which are in their terms dispositive and those which are of an equivocal character, that the first will be entitled to probate, unless, as in *Nicholls* v. *Nicholls* (*m*), they proved not to have been written *animo testandi*; whilst, in the latter, the animus must be proved by the party claiming under it.

Instrument not made testamentary by postponing enjoyment.

But, as already observed, an instrument is not testamentary merely because actual enjoyment under it is postponed until after the donor's death. If it has present effect in fixing the terms of that future enjoyment, and therefore does not require the death of the alleged testator for its consummation, it is not a will. Therefore, where there was an agreement for a lease, which contained a provision for the distribution of the rent after the lessor's death among his grandchildren, of whom the lessee was one, it was held that this provision, being part of the consideration for which the lessee was to pay his rent, was irrevocable; it was therefore not testamentary (*n*). The Court was asked to grant probate only of a part of the document, namely, that which contained the provision in question: and as to this, Sir J. P. Wilde said he had met with no case where it had been done, although he by no means said it could not be done. And in fact, in the case (there cited) of *Doe* d. *Cross* v. *Cross* (*o*), where an instrument in the form of a power of attorney was given by a person abroad, whereby he appointed his mother to receive the rent of his lands for her own use, until he might return to England; or in the event of his death, he "thereby assigned and delivered to her the sole claim to his lands," but her occupancy was to cease on his return: this instrument was

Probate of part of an instrument.

(*k*) *Glynn* v. *Oglander*, 2 Hagg. 428.

(*l*) *Griffin* v. *Ferard*, 1 Curt. 97. (*m*) 2 Phillim. 180.

(*n*) *In b. Robinson*, L. R. 1 P. & D. 384; and see *Patch* v. *Shore*, 2 Dr. & Sm. 589.

(*o*) 8 Q. B. 714. See also *Peacock* v. *Monk*, 1 Ves. Sen. 127; *Wolfe* v. *Wolfe*, [1902] 2 Ir. R. 246.

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properly executed as a will, and was held to be a good will of the lands in question. The Court was clear that there was no objection to one part of an instrument operating *in præsenti* as a deed, and another *in futuro* as a will.

But the fact that the document is executed as a will, and that, either wholly or partially, it is to take effect after the donor's death, does not necessarily make it testamentary (*p*).

Marriage contract.

A marriage contract containing a clause which is in reality contractual although with testamentary effect is not a will in the sense of the Wills Act (*q*).

Where property is given by will, and a trust affecting it is created dehors the will, the title of the *cestui que trust* is not testamentary (*r*).

Contingent wills.

IV.—Contingent, Joint, and Mutual Wills.—A will may be made so as to take effect only on a contingency (*s*), and if the contingency does not happen the will ought not to be admitted to probate (*t*). The contingency will generally attach to every part of the will, *e.g.*, to a clause revoking former wills (*u*). But a codicil in other respects contingent will be admitted to probate, because it may operate as a republication of the will (*x*). A reference to some impending danger is common to most of these cases, and the question is whether the possible occurrence of the event is the reason for the particular disposition which the testator makes of his property, as where he says, "Should anything happen to me on my passage to W., I leave," etc. (*y*); or only the reason for making a will, as where he says, "In case of accident, being about to travel by railway, I bequeath," etc. (*z*). A will may also be made contingent on the assent of another person (*a*).

(*p*) *Thorncroft* v. *Lashmar*, 31 L. J. P. 150.

(*q*) *Battye's Trustees* v. *Battye*, [1917] S C. 385.

(*r*) *Cullen* v. *Att.-Gen. for Ireland*, L. R. 1 H. L. 190; *Re Maddock*, [1901] 2 Ch. 372. On the question whether an instrument which is testamentary in its character, but inadmissible to probate, can be enforced as creating a trust, see *Smith* v. *Attersoll*, 1 Russ. 266; *Johnson* v. *Ball*, 5 De G. & S. 89; *Consett* v. *Bell*, 1 Y. & C. C. C., at p. 577.

(*s*) See *In b. Newns*, 7 Jur. (N.S.) 688.

(*t*) *Parsons* v. *Lanoe*, 1 Ves. Sen. 190; *Sinclair* v. *Hone*, 6 Ves. 607.

(*u*) *In b. Hugo*, 2 P. D. 73.

(*x*) *In b. Da Silva*, 30 L. J. P. 171; *In b. Colley*, 3 L. R. Ir. 243.

(*y*) *Roberts* v. *Roberts*, 31 L. J. P. 46; *In b. Porter*, L. R. 2 P. & D. 22; *In b. Robinson*, *ib.* 171; *Lindsay* v. *Lindsay*, *ib.* 459; *In b. Hugo*, 2 P. D. 73.

(*z*) *In b. Thorne*, 34 L. J. P. 131; *In b. Dobson*, L. R. 1 P. & D. 88; *In b. Martin*, *ib.* 380; *In b. Stuart*, 21 L. R. Ir. 105. But the expressions used by the testator must be such as clearly to indicate his intention that the will is only to take effect upon his death during a particular journey or period; if the expressions are equivocal, the will will not be regarded as conditional, but will be admitted to probate, though the journey or period has been completed: *In b. Mayd*, 6 P. D. 17; *In b. Spratt*, [1897] P. 28; *Halford* v. *Halford*, [1897] P. 36; *Townsend* v. *Moore*, [1905] P. 66; *In b. Vines*, [1910] P. 147 (where evidence of declarations made by the testator was admitted).

(*a*) *In b. Smith*, L. R. 1 P. & D 717.

A will, intended to take effect as an exercise of a power, is not necessarily conditional on the existence of the power, if the testator has an interest independent of the power (*b*), or a power not expressly referred to (*c*), sufficient to support the disposition; for if an intention appears to dispose of the property, it matters not that the testator mistook the origin or nature of his dispositive power. And if the testator has no interest, still the will may raise a case of election (*d*).

Where the will is in terms clearly contingent, and the contingency has failed, the will cannot either as to real estate (*e*), or, since the Wills Act, as to personal estate (*f*), be set up but by some act amounting to a re-execution of it (*g*). Without some such act it is a nullity, and a previous will stands unrevoked (*h*). When on the death of the testator the event is still in suspense, general probate will be granted at once (*i*). Of course the question still remains open what effect the will is to have.

Joint will.

Two or more persons may make a joint will, which, if properly executed by each, is, so far as his own property is concerned, as much his will, and is as well entitled to probate upon his death, as if he had made a separate will (*k*). But a joint will made by two persons, to take effect after the death of both, will not be admitted to probate during the life of either (*l*). Joint wills are revocable at any time by either of the testators during their joint lives, or, after the death of one of them, by the survivor (*m*).

Mutual wills.

Mutual wills are recognised by the Roman-Dutch law which is in force at the Cape of Good Hope, Ceylon, etc. A mutual will is regarded as being in effect two separate wills, in which the disposition of each testator is treated as applicable to his

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(*b*) *Southall* v. *Jones*, 28 L. J. P. 112; *Jones* v. *Southall*, 30 Beav. 187; *Sing* v. *Leslie*, 2 H. & M. 68, *post*, p. 810. This interest must be a bequeathable interest. The will of a married woman would be inoperative to dispose of such an interest: *Price* v. *Parker*, 16 Sim. 198; unless the case comes within the Married Women's Property Act, 1882.

(*c*) *Re Wilmot*, 29 Beav. 644; *Bruce* v. *Bruce*, L. R. 11 Eq. 371.

(*d*) *Re Brooksbank*, 34 Ch. D. 160.

(*e*) *Parsons* v. *Lanoe*, 1 Ves. Sen. 190.

(*f*) *Roberts* v. *Roberts*, 31 L. J. P. 46; *In b. Winn*, 2 Sw. & Tr. 147. *Secus*, before 1 Vict. c. 26, *Burton* v. *Collingwood*, 4 Hagg. 176; *Strauss* v. *Schmidt*, 3 Phillim. 209.

(*g*) *In b. Cawthron*, 33 L. J. P. 23.

(*h*) *In b. Robinson*, L. R. 2 P. & D. 171.

(*i*) *In b. Cooper*, 1 Deane, Eccl. R. 9. It is presumed, though it is not so stated in the report, that the children were minors. See also *In b. Bangham*, 1 P. D. 429.

(*k*) *In b. Stracey*, 1 Jur. (N.S.) 1177; *Re Miskelly*, Ir. R. 4 Eq. 62; *In b. Piazzi-Smyth*, [1898] P. 7.

(*l*) *In b. Raine*, 1 Sw. & Tr. 144; *In b. Piazzi-Smyth*, [1898] P. 7.

(*m*) *Hobson* v. *Blackburn*, 1 Add. 274; *In b. Lovegrove*, 2 Sw. & Tr. 453; *In b. Fletcher*, 11 L. R. Ir. 359.

share of the joint property (*n*). Instruments of this nature are unknown to the testamentary law of this country (*o*), and with us the term "mutual will" is generally applied to the case of two persons making a will by which each leaves all his property to the other (*p*).

Sometimes a husband and wife each make wills giving all their property to the other with alternative provisions in the case of lapse. Such wills are often referred to as mutual wills when made in pursuance of an agreement. In such cases the survivor can revoke or alter his or her will (*q*). But in some cases a mutual agreement as to the disposal of the property has been held to be enforceable in equity (*r*) if it is clear and fair in its terms (*s*).

The fact that a husband and wife have simultaneously made mutual wills, giving each to the other a life interest with similar provisions in remainder, is not in itself evidence of an agreement not to revoke the wills; in the absence of a definite agreement to that effect there is no implied trust precluding the wife from making a fresh will inconsistent with her former will, even though her husband has died and she has taken the benefits conferred by his will. Although by the mutual wills the wife expressly has refrained from exercising a power of appointment which her husband had only in default of her exercising it, and he has appointed, the wife can both take the benefit of her husband's will and exercise her power of appointment, unless the language of his will either puts her to her election, or places her in the position of seeking at the same time to approbate and reprobate its provisions (*ss*).

Probate how far conclusive as to personalty.

V.—Effect of Probate.—"The granting of probate," says Mr. Jarman (*t*), "is conclusive as to the testamentary character of the instrument in reference to personalty" (*u*). Everything

(*n*) *Denyssen* v. *Mostert*, L. R. 4 P. C. 236; *Dias* v. *De Livera*, 5 A. C. (P. C.) 123, 136.

(*o*) See Will. Exors., p. 7 (11th ed.). See also 1 Cowp. 268; 1 Add. 277.

(*p*) *In b. Lovegrove*, 2 Sw. & Tr. 453; *In b. Heys*, [1914] P. 192, at p. 196. In *In b. Piazzi-Smyth*, [1898] P. 7, the will was partly joint and partly mutual. In *In b. Cotton*, [1923] 2 Ir. R. 52, there was one will.

(*q*) *In b. Heys*, [1914] P. 192; *Re Oldham*, [1925] Ch. 75.

(*r*) *Dufour* v. *Pereira*, 1 Dick. 419; see *Stone* v. *Hoskins*, [1905] P. 194.

(*s*) *Walpole* v. *Orford*, 3 Ves. 402.

(*ss*) *Gray* v. *Perpetual Trustee Co.*, [1928] A. C. 391.

(*t*) First edition, p. 22.

(*u*) *Re Barrance*, [1910] 2 Ch. 419. "See *Douglas* v. *Cooper*, 3 My. & K. 378. The executors are considered as representing the legatees, in regard to the litigation respecting the validity of the will; and unless a case of fraud and collusion can be made out against them, the legatees are bound by the adjudication in the suit to which the executors are parties: *Colvin* v. *Fraser*, 2 Hagg. 292; *Wood* v. *Medley*, 1 Hagg. 645; *Newell* v. *Weeks*, 2 Phillim. 224; and that, too, though the same persons are executors under two conflicting testamentary instruments. *Hayle* v. *Hasted*, 1 Curt. 236. The Court, however, sometimes directs the parties interested to be brought before it: *Reynolds* v.

included in the probate copy (*x*), but no word besides (*y*), must be taken by the Court of construction to be part of the will, and the original will cannot be appealed to for the purpose of showing that such copy is erroneous (*z*). Thus where probate was granted, with cross lines drawn over the bequests of certain legacies, Lord Cranworth held that it was to be taken as conclusively settled by the probate, that the will was at its execution in the state in which it was then found, *i.e.*, that the testator had executed the instrument with the cross lines drawn over it (*a*). That being so, the only question for him to determine was what did the instrument mean—and he thought the meaning was, that the testator's original intention to give the legacies had ceased, and that he had placed the lines there to show this. The result was that the legacies were struck out (*b*). Neither was it competent for the Court of Chancery, on the ground that legacies given by a codicil were fraudulently obtained, to declare the legatee a trustee for the person who would otherwise have taken. The objection on the ground of fraud should be taken in the Probate Court, which, on being satisfied of the fraud, would direct probate to issue, omitting that part containing the bequest complained of (*c*), or declaring that the legatees are trustees for the claimant (*d*). So if it is alleged that words have been inserted in the will by mistake, this can only be corrected by the Court of Probate (*e*). And practically this division of jurisdiction is continued as between the Chancery and Probate

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Thrupp, 1 Curt. 570." [Note by Mr. Jarman.] But if the administration of the property is affected by a question as to the testator's domicil, the executors are not deemed to represent the persons interested for the purpose of raising the question of domicil, and the decision of the Probate Court on that question will not bind the parties in a suit for the administration of the estate : *Concha* v. *Concha*, 11 A. C. 541.

(*x*) *Gann* v. *Gregory*, 3 D. M. & G. 777. Probate in facsimile was also granted *In b. Raine*, 34 L. J. P. 125, *post*, Chap. V.

(*y*) *Barnaby* v. *Tassell*, L. R. 11 Eq. 368. As to omission from the probate of scurrilous imputations on character, see *In b. Honywood*, L. R. 2 P. & D. 251; *Re White*, [1914] P. 153; *In b. Maxwell*, 73 Sol. J. 159. Words which are not defamatory will not be omitted : *Re Caie's Estate*, 71 Sol. J. 898. As to the omission from the probate of words inserted by mistake, see *ante*, p. 32.

(*z*) But the Court sometimes looks at the original will to see whether the punctuation or the mode in which it is written throws any light on its construction : *post*, p. 47. If the probate copy is erroneous, it ought to be sent back to the Court of Probate for rectification.

(*a*) The general presumption is that alterations in a will were made after its execution : see *post*, p. 143, but that is for the consideration of the Court of Probate.

(*b*) *Gann* v. *Gregory*, 3 D. M. & G. 777.

(*c*) *Allen* v. *M'Pherson*, 1 H. L. C. 191; 11 Jur. 785, affirming 1 Phil. 133, and reversing 5 Bea. 469; *Hindson* v. *Weatherill*, 5 D. M. & G. 301. So the Court of Chancery had no jurisdiction to set aside a will of lands for fraud. The remedy was by ejectment : *Jones* v. *Gregory*, 2 D. J. & S. 83.

(*d*) *Betts* v. *Doughty*, 5 P. D. 26. Probate may also be revoked on the ground of fraud : *Birch* v. *Birch*, [1902] P. 130.

(*e*) *Re Bywater*, 18 Ch. D. 17.

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Divisions of the High Court of Justice (*f*), the Judges of the former Division declining (in their discretion) to exercise the jurisdiction of the latter in matters of probate (*g*).

As to realty.

The Court of Probate Act, 1857 (*h*), gave to probate, after citation of the heir and other persons interested, and proof in solemn form, the same effect with regard to realty as it had before with regard to personalty (*i*). But the granting of probate in common form had no effect as regards real estate, either freehold or copyhold (*k*), except (under the Act of 1857) to furnish *prima facie* evidence of the validity and contents of the will (*l*).

Will of real estate, whether entitled to probate.

Under the old law, a will disposing of real estate only was not entitled to probate (*m*) unless it appointed an executor, in which case it was entitled to probate (*n*); and if the executor renounced, a grant of administration with the will annexed would be made (*o*). But in the case of a testator who makes a will disposing of real estate (*p*) and dies since December 31, 1897, the real estate vests on his death in his personal representatives, and their assent is necessary to any devise contained in the will. In such a case, therefore, the will must be proved, and the Land Transfer Act, 1897 (*q*), accordingly enacted that probate and administration may be granted in respect of real estate only, although there is no personal estate.

As to probate of appointments under testamentary powers, see Chap. XXIII.

Limited effect of probate.

Even with respect to personal estate, the granting of probate

(*f*) *Meluish* v. *Milton*, 3 Ch. D. 27, 35.

(*g*) *Pinney* v. *Hunt*, 6 Ch. D. 98; *Bradford* v. *Young*, L. R. 26 Ch. D. 656; *Smart* v. *Tranter*, L. R. 40 Ch. D. 165; 43 Ch. D. 587. In *Re Birchall*, 29 W. R. 461, the person who had committed the fraud was dead; Malins, V.-C., presumed that he had acted properly on the ground that he was a person "of the greatest apparent respectability and holding the highest offices."

(*h*) 20 & 21 Vict. c. 77, ss. 61, 62; repealed by the Supreme Court of Judicature Act, 1925.

(*i*) To bring a will within the purview of this enactment, it must be one which both as to realty and personalty is to be tested by the same considerations. For if there were any difference between them, it would be absurd to enact that probate of one should be conclusive evidence of the validity of the other. Consequently it must be a will executed since and according to the statute 1 Vict. c. 26: *Campbell* v. *Lucy*, L. R. 2 P. & D. 209. It is not necessary to cite the assignee of the heir; if the heir is a party, his assignee will be bound: *Jones* v. *Jones*, L. R. 7 P. D. 66.

(*k*) *Hume* v. *Rundell*, 6 Madd. 331. See also *Bonser* v. *Bradshaw*, 5 Jur. (N.S.) 86; *Loffus* v. *Maw*, 3 Giff. 592.

(*l*) *Barraclough* v. *Greenhough*, L. R. 2 Q. B. 612.

(*m*) *In b. Bootle*, L. R. 3 P. & D. 177; *In b. Lloyd*, 9 P. D. 65; *In b. Gunn*, *ib.* 242 (conversion of money into realty, etc.).

(*n*) *O'Dwyer* v. *Geare*, 1 Sw. & Tr. 465; *In b. Hornbuckle*, 15 P. D. 149. In *Brownrigg* v. *Pike*, 7 P. D. 61, and in *In b. Cubbon*, 11 P. D. 169, the testatrix also had separate personal estate.

(*o*) *In b. Jordan*, L. R. 1 P. & D. 555.

(*p*) "Real estate" did not include copyholds or customary freeholds where admission was necessary: Land Transfer Act, 1897, s. 1, sub-s. 4.

(*q*) Now replaced by the Administration of Estates Act, 1925.

of any paper has no other effect than to establish generally its claim to be received as testamentary (*r*); and it remains for the Court of construction to determine the meaning and effect of the instrument thus stamped with a testamentary character (*s*). The adjudication of this Court may, and often does, render the paper wholly nugatory. It may be found not to contain any intelligible disposition of the deceased's property (*t*), or to be in substance the same as or in substitution for another paper of which probate has been granted (*u*); or that its provisions are invalid according to the law of a foreign country, which constituted the domicil of the maker at the time of his decease (*x*); in all which cases the instrument so proved operates merely as an appointment of an executor, who distributes the property as under an intestacy.

Original will may be examined by Court of construction.

And to determine the construction, the original will, both of real and personal property, may be looked at (*y*). It was said, indeed, by Sir W. Grant (*z*), that his decision on the construction of the will before him could not depend on the grammatical skill of the writer, in the position of the characters expressive of a parenthesis: that it was from the words and from the context, not from the punctuation, that the sense must be collected. And there are, probably, few imaginable cases in which punctuation could exercise a very important influence upon the construction (*a*). But in recent times, the Courts have without hesitation adopted the practice of examining original wills "with a view to see whether anything there appearing,—as, for instance, the mode in which it was written, how 'dashed and stopped,'—could guide them in the true construction to be put upon it" (*b*).

(*r*) As to what papers are testamentary, see *In b. Durance*, L. R. 2 P. & D. 406; *Toomer* v. *Sobinska*, [1907] P. 106. Compare *In b. Da Silva*, 30 L. J. P. cited *ante*, p. 42.

(*s*) *In b. Mundy*, 30 L. J. P. 85.

(*t*) See *Gawler* v. *Standerwick*, 2 Cox, 16; *Mayor, etc., of Gloucester* v. *Wood*, 3 Hare, 131; 1 H. L. C. 272.

(*u*) See *Heming* v. *Clutterbuck*, 1 Bli. (N.S.) 479; *S. C. nom. Hemming* v. *Gurrey*, 1 D. & Cl. 35; *Walsh* v. *Gladstone*, 1 Phil. 290; 13 Sim. 261; *Campbell* v. *Radnor*, 1 Bro. C. C. 271.

(*x*) *Thornton* v. *Curling*, 8 Sim. 310; see *ante*, p. 9, n. (*k*). Probate is not conclusive of domicil: *Bradford* v. *Young*, 26 Ch. D. 656; *De Mora* v. *Concha*, 29 Ch. D. 268.

(*y*) See Mr. Hare's note to *Walker* v. *Tipping*, 9 Ha. 802, n., where *Philipps* v. *Chamberlaine*, 4 Ves. 57, and *Compton* v. *Bloxham*, 2 Coll. 204, are referred to.

(*z*) *Sanford* v. *Raikes*, 1 Mer. 651.

(*a*) See *per* Sir E. Sugden, *Heron* v. *Stokes*, 2 Dr. & War. 98; and *per* Lord Westbury, *Gordon* v. *Gordon*, L. R. 5 H. L. 276; *Re Campbell*, [1918] 1 Ir. R. 429. But the punctuation may be regarded: *Houston* v. *Burns*, [1918] A. C. 337.

(*b*) This passage is quoted with approval by Astbury, J., in *Re Battie-Wrightson*, [1920] 2 Ch. p. 330, at p. 334 (where the Court looked at the original will to read an erasure). See *per* Knight Bruce, L.J., in *Manning* v. *Purcell*, 24 L. J. Ch. 523, n.; also reported 7 D. M. & G. 55. See also *Compton* v. *Bloxham*, 2 Coll. 201; *Child* v. *Elsworth*, 2 D. M. & G. 683; *Oppenheim* v. *Henry*, 9 Hare, 802, n.;

And where a will is in a foreign language, and the probate copy is a translation, the Court may look at the original will, or a copy of it, in order to ascertain its meaning (*c*).

Probate of wills of married women.

Probate of the will of a married woman is now granted to her executor in the ordinary form without any exception or limitation (*d*). Formerly it was limited to property which she had power to dispose of and had disposed of, with administration *cæterorum* to the husband; and under the Judicature Act, 1873 (*e*), it was the duty of the Probate Division (so far as could properly and conveniently be done) to decide whether any particular fund was separate property or not (*f*). Formerly also if a married woman made a will by which she merely exercised a power of appointment, and appointed an executor, probate could not be granted (*g*). The present practice is based on the Married Women's Property Act, 1882 (*h*); but is not confined to cases where the testatrix has the powers conferred by that Act. Whether she has or not any such powers the probate is conclusive, as regards the right of the executors to get in the assets, in the Chancery Division, but it does not alter the beneficial title of the husband to any property which the wife had no power to dispose of; the executors will hold such property in trust for the husband (*i*). If no executor is appointed and there is a partial intestacy, the husband was entitled to administration

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Gauntlett v. *Carter*, 17 Bea. 590; *Milsome* v. *Long*, 3 Jur. (N.S.) 1073; *Re Harrison*, 30 Ch. D. 390. In *Gann* v. *Gregory*, 3 D. M. & G. 780 (already referred to), Lord Cranworth expressed his opinion that the will could not be looked at for the purpose of virtually reversing the decision of the Probate Court with respect to the form of the probate copy in question. In *Re Wyatt*, 4 T. L. R. 245, the Court referred to the original will for the purpose of supplying the name of an annuitant: it had been erased and was left blank in the probate copy.

(*c*) *L'Fit* v. *L'Batt*, 1 P. W. 526; *Re Cliff's Trust*, [1892] 2 Ch. 229; *Re Manners*, [1923] 1 Ch. 220. The proper course, however, seems to be to apply to the Court of Probate to correct the translation. In *Steignes* v. *Steignes*, Mos. 296, the word *meubles* in the original will was translated "moveables" in the probate copy, "by which," said the Solicitor-General, arguendo, "we must go"; and the Court construed the will as if "moveables" had been the word used by the testator.

(*d*) *In b. Price*, 12 P. D. 137. See also *Re Lambert's Estate*, 39 Ch. D. 626; *Smart* v. *Tranter*, 43 Ch. D. 587; *Re Atkinson*, [1899] 2 Ch. 1. It is not necessary that the will should dispose of her separate estate: *In b. Ievers*, 13 L. R. Ir. 1.

(*e*) 36 & 37 Vict. c. 66.

(*f*) *In b. Tharp*, 3 P. D. 76.

(*g*) *Tugman* v. *Hopkins*, 4 M. & Gr. 389; *O'Dwyer* v. *Geare*, 1 Sw. & Tr. 465; *In b. Barden*, L. R. 1 P. & D. 325; *In b. Tharp*, 3 P. D. 76; *In b. Tomlinson*, 6 P. D. 209.

(*h*) 45 & 46 Vict. c. 75.

(*i*) *Smart* v. *Tranter* (in C. A.), 43 Ch. D. 587, reversing on the latter point the decision of Kay, J., *S. C.* 40 Ch. D. 165; *Miners* v. *Lawry*, 60 Sol. J. 666.

with the will annexed in preference to the next-of-kin of the testatrix (*k*).

Wills of married woman domiciled abroad.

If a married woman domiciled abroad makes a will appointing executors, which is invalid by the law of her domicil, but is operative under English law (*e.g.*, as an appointment under a power), administration with the will annexed may be granted to the executors (*l*).

Revocation of probate.

If probate of an invalid will is granted in common form, the executor can sue for and give a good discharge for any debt due to the deceased (*m*). If probate is revoked, it is for some purposes treated as a nullity *ab initio* (*n*); but under section 37 of the Administration of Estates Act, 1925, all conveyances of any interest in real or personal property made to a purchaser by a person to whom probate or letters of administration have been granted are valid notwithstanding any subsequent revocation or variation of the probate or administration (*o*).

Donatio mortis causa.

VI.—Donatio mortis causa.—Although a *donatio mortis causa* is not a gift by will, yet it in some respects has a testamentary character. It differs from an ordinary gift *inter vivos* in two respects: (i) it only takes effect if the donor dies and not otherwise; (ii) a complete transfer of the legal title is not essential.

"Where a man lies in extremity or being surprised with sickness and not having an opportunity of making his will, but lest he should die before he could make it, he gives with his own hands his goods to his friends about him: this if he dies shall operate as a legacy, but if he recovers then does the property thereof revert to him" (*p*). The conditional nature of the gift need not be expressed: it is implied in the absence of evidence to the contrary (*q*). And even if the transaction is such as would in the case of a gift *inter vivos* confer a complete legal title, if the circumstances authorise the supposition that the gift was made in contemplation of death, *mortis causa* is presumed (*r*).

Delivery is essential, though it may be antecedent to the gift (*s*), and the mere fact of the donor agreeing to take back

(*k*) Rules of 1887, cited 39 Ch. D. 627, n. And if there is an executor, but separate estate is undisposed of, the husband surviving was before 1926 entitled beneficially: *Re Lambert's Estate*, 39 Ch. D. 626.

(*l*) *In b. Tréfond*, [1899] P. 247; *In b. Vannini*, [1901] P. 330.

(*m*) Administration of Estates Act, 1925, s. 27.

(*n*) *Per* Lord Davey in *Chan Kit San* v. *Ho Fung Hang*, [1902] A. C., at p. 260. See *Re West*, [1909] 2 Ch. 180.

(*o*) See *Hewson* v. *Shelby*, [1914] 2 Ch. 13, overruling *Ellis* v. *Ellis*, [1905] 1 Ch. 613.

(*p*) *Per* Cowper, C., in *Hedges* v. *Hedges*, Pr. Ch. 269.

(*q*) *Gardner* v. *Parker*, 3 Madd. 184.

(*r*) *Staniland* v. *Willott*, 3 Mac. & G. 664.

(*s*) *Cain* v. *Moore*, [1896] 2 Q. B. 283.

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the property after delivery for safe custody does not affect the validity of the gift (*t*).

What delivery sufficient.

Since a transfer of the legal title is not necessary, the delivery of a mortgage deed may constitute a *donatio mortis causa* of the mortgage debt (*u*). An inchoate or imperfect delivery may be sufficient, as where the donor delivered to his wife the key of a box at the bank containing bonds to bearer (*x*), and *semble* there may be symbolic delivery where the thing is not capable of immediate actual delivery (*y*). But where the donor retained possession of the key of a cash box containing a deposit receipt and two " stale " cheques, it was held by the Court of Appeal that there was no valid *donatio mortis causa* inasmuch as the deceased never intended to part with the actual possession of the documents in such a way as to lose dominion and control over them during his life (*z*). The gift must be immediate: delivery to A of the keys of a dressing-case containing a watch and trinkets, with instructions to hand the same to B upon the death of the donor, does not constitute a valid *donatio mortis causa* (*a*): nor must delivery be of such kind as to amount to an attempt to make a will without complying with the formalities of the Wills Act (*b*). When at the time a gift is made the donor contemplates suicide and does in fact commit suicide shortly afterwards the gift is not a valid *donatio mortis causa* (*c*).

Suicide.

Instances.

Registered Victory Bonds (*d*); a non-transferable deposit receipt (*e*); unendorsed promissory notes payable to order (*f*); cheques payable to the donee or order (*g*); a post-office savings-bank book (*h*); an Exchequer Bond deposit book issued by the post office and containing a certificate of the donor's title to registered Exchequer Bonds acquired through the post office (*i*), have been the subjects of good *donatio mortis causa*; but not certificates of railway stock (*k*); nor Consols invested through a savings bank (*l*); nor a donor's own promissory note (*m*);

(*t*) *Re Hawkins*, [1924] 2 Ch. 47.
(*u*) *Duffield* v. *Hicks*, 1 Bli. (N.S.) 497: reversing *Duffield* v. *Elwes*, 1 Sim. & St. 239.
(*x*) *Re Wasserberg*, [1915] 1 Ch. 195.
(*y*) *Mustapha* v. *Wedlake*, [1891] W. N. 201.
(*z*) *McAndrew* v. *Mulroy*, [1924] 1 Ir. R. 98.
(*a*) *Powell* v. *Hellicar*, 26 Bea. 261.
(*b*) *Farquharson* v. *Cave*, 2 Coll. 356; *Re Hughes*, 36 W. R. 821; *Solicitor to the Treasury* v. *Lewis*, [1900] 2 Ch. 812.
(*c*) *Re Dudman*, [1925] Ch. 553.
(*d*) *Re Richards* (*No.* 2), [1921] 1 Ch. 513.
(*e*) *Re Dillon*, 44 Ch. D. 76.
(*f*) *Veal* v. *Veal*, 27 Bea. 303.
(*g*) *Rolls* v. *Pearce*, 5 Ch. D. 730; *Clement* v. *Cheesman*, 27 Ch. D. 631.
(*h*) *Re Weston*, [1902] 1 Ch. 680.
(*i*) *Re Lee*, [1918] 2 Ch. 320.
(*k*) *Moore* v. *Moore*, L. R. 15 Eq. 474.
(*l*) *Re Andrews*, [1902] 2 Ch. 394.
(*m*) *Re Leaper*, [1916] 1 Ch. 579.

nor the cheque of a donor not honoured on presentation in donor's life-time (*n*); nor the cheque of a donor presented after death where the account is overdrawn (*o*).

The assignment of the gift is governed by the law of the place where the movables are situate, the law applicable being that applicable to gifts *inter vivos* (*p*).

Donationes mortis causa are included in property deemed to pass on the death of the deceased under section 2, sub-section 1 (c) of the Finance Act, 1894. The subject-matter of a *donatio mortis causa* is "property which does not pass to the executor as such" within section 9, sub-section 1 of that Act (*q*). But *quære* whether it is "property of which the deceased was competent to dispose at his death" within the meaning of section 6, sub-section 2 (*q*).

If an instrument is clearly testamentary, but not duly attested, it will not be supported as a *donatio mortis causa* (*r*).

(*n*) *Re Swinburne*, [1926] Ch. 38.
(*o*) *Re Beaumont*, [1902] 1 Ch. 889. See also *Re White*, [1928] W. N. 182.
(*p*) *Re Korvine's Trust*, [1921] 1 Ch. 343.
(*q*) *Re Hudson*, [1911] 1 Ch. 206.
(*r*) *Re Hughes*, 36 W. R. 821; *Solicitor to the Treasury* v. *Lewis*, [1900] 2 Ch. 812. As to the revocation of a *donatio mortis causa* by a subsequent will, see *Hudson* v. *Spencer*, [1910] 2 Ch. 285. A P.O. Savings Bank nomination form not duly witnessed cannot be supported as a *donatio mortis causa*, *Pearman* v. *Charlton*, 44 T. L. R. 517.

CHAPTER III.

PERSONAL DISABILITIES OF TESTATORS.

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Removal of disability after execution of will.

A WILL made during any personal disability is not rendered valid by the fact of the disability having been removed during the life of the testator, unless its removal has been followed by some act of confirmation or adoption amounting in law to re-execution of the will (*a*).

Old law.

I.—Infancy.—At common law, infants of a certain age, namely, males of fourteen and females of twelve, were competent to dispose by will of personalty (*b*), and such a will was valid, although the testator or testatrix afterwards lived to attain majority without confirming it (*c*). In some places a custom existed enabling infants of a definite and reasonable age to devise real estate (*d*), but in the absence of such a custom infants were incompetent to dispose of real estate by will (*e*). Under the statute 12 Car. 2, c. 24, a father, even though an infant, could appoint guardians of his children by will.

Present law.

The Wills Act, 1837, enacts (section 7) that no will made by any person under the age of twenty-one years shall be valid. And by the definition clause in the Act this provision is extended to appointments of testamentary guardians under the Act of Charles II. Section 11 of the Wills Act exempts from the operation of the Act wills of personal estate made by soldiers on actual service or by mariners at sea, and this privilege has been extended to real estate and to members of the Air Force by the Wills (Soldiers and Sailors) Act, 1918, but with this exception

(*a*) *Bunter* v. *Coke*, 1 Salk. 237; 1 Eq. Ca. Abr. 172, pl. 3. See also *Noble* v. *Willock* (or *Willock* v. *Noble*), 7 L. R. 7 H. L. 580.

(*b*) *Bishop* v. *Sharp*, 2 Vern. 469; *Whitmore* v. *Wild*, 2 Ch. Rep. 383; *Hyde* v. *Hyde*, 1 Eq. Ca. Abr. 408.

(*c*) *Hinckley* v. *Simmons*, 4 Ves. 160.

(*d*) 2 Anders. 12.

(*e*) Stat. 34 & 35 Hen. 8, c. 5, s. 14.

(as to which see Chap. VI) every will made by an infant is invalid (*ee*).

Mode of computing age.

"It may not be quite superfluous to remark," says Mr. Jarman (*f*), "that, in computing the age of a person for testamentary or other purposes, the day of his birth is included; thus, if he were born on the 16th of January, 1800, he would have attained his majority on the 15th of January, 1821 (*g*); and as the law does not recognise fractions of a day (*h*), the age would be attained at the first instant of the latter day."

Onus probandi.

II.—Insanity, Weakness of Mind, etc.—The general rule is "that the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator" (*i*). But if a will is rational on the face of it, and appears to be duly executed, it is presumed, in the absence of evidence to the contrary, to be valid (*k*).

Wills of idiots.

The will of an idiot is of course void (*l*). Mental imbecility arising from advanced age, or produced permanently or temporarily by excessive drinking or any other cause, may destroy testamentary power (*m*).

Of persons deaf and blind.

"A person who has been from his nativity blind, deaf and dumb, is intellectually incapable of making a will, as he wants those senses through which ideas are received into the mind" (*n*). Blindness or deafness alone, however, produces no such incapacity. And it seems that a person born deaf and dumb, but not blind, though *prima facie* incapable (*o*), may be shown to have capacity, and to understand what is written down (*p*);

(*ee*) As to nominations by persons over sixteen, see *ante*, p. 38.

(*f*) First edition, p. 37.

(*g*) *Re Shurey*, [1918] 1 Ch. 263; *Herbert* v. *Torball*, 1 Sid. 162; *S. C. nom. Herbert* v. *Tuckal*, T. Raym. 84; 8 Vin. Dev. G. pl. 20; *Anon.*, 1 Salk. 44; *Howard's Case*, 2 *ib.* 625. But a person attains "his 25th year" when he becomes twenty-four years old: *Grant* v. *Grant*, 4 Y. & C. 256.

(*h*) See *Lester* v. *Garland*, 15 Ves. 257.

(*i*) *Barry* v. *Butlin*, 2 Moo. P. C. 480; *Browning* v. *Budd*, 6 Moo. P. C. 435; *Sutton* v. *Sadler*, 3 C. B. (N.S.) 87; *Cleare* v. *Cleare*, L. R. 1 P. & D. 655; *Fulton* v. *Andrew*, L. R. 7 H. L. 448. This subject has been already referred to in connection with questions of undue influence, fraud, etc., *ante*, p. 33.

(*k*) See *Foot* v. *Stanton*, 1 Dea. 19; *Symes* v. *Green*, 1 Sw. & Tr. 401.

(*l*) Dyer, 143b.

(*m*) See Swinb. P. II, ss. 5, 6. And as to the difference in proof of lucid intervals in case of imbecility from drinking and ordinary imbecility, see *Ayrey* v. *Hill*, 2 Add. 206. In *Foot* v. *Stanton*, 1 Deane, 19, the will of a person subject to epileptic fits was admitted to probate, although there was no evidence that the testatrix knew its contents, the memory of the attesting witnesses failed, and a third person declared she was unfit to make a will.

(*n*) First edition of this work, p. 29. See Co. Litt. 42b.

(*o*) Swinb. P. II, s. 10.

(*p*) *Dickenson* v. *Blissett*, 1 Dick. 268; *Re Harper*, 6 M. & Gr. 732. As to the evidence required, see *In b. Owston*, 31 L. J. P. 177; *In b. Geale*, 33 L. J. P. 125.

and this of course applies more strongly to a person deaf and dumb from accident (*q*). Indeed, it has even been held that a will need not be read over to a blind testator previously to its execution, provided there be proof *aliunde* of a clear knowledge of the contents of the instrument (*r*); but it is almost superfluous to observe, that, in proportion as the infirmities of a testator expose him to deception, it becomes imperatively the duty, and should be anxiously the care, of all persons assisting in the testamentary transaction, to be prepared with the clearest proof that no imposition has been practised (*s*). This remark especially applies to wills executed by the inmates of lunatic asylums (*t*), or any other persons habitually or occasionally afflicted with insanity.

In case of weakness of mind, strong proof required as to knowledge of contents of will.

In cases of weakness of mind arising from the near approach of death, strong proof is required that the contents of the will were known to the testator (*u*), and that it was his spontaneous act (*x*). It is not, however, essential that the testator should at the time he signs the will be mentally competent to understand it: if while he is mentally competent he gives instructions for his will, and it is prepared in accordance with them, and at the time of signing it he understands that he is executing the will for which he had given instructions, the will is valid, although at the time of signing it he may not be able to understand its provisions in detail (*y*). On the other hand, a suspicion is justly entertained of a will conferring large benefits on the person by

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(*q*) Swinb. P. II, s. 10.

(*r*) *Longchamp* d. *Goodfellow* v. *Fish*, 2 B. & P. N. R. 415; *Fincham* v. *Edwards*, 3 Curt. 63; and see *Mitchell* v. *Thomas*, 6 Moo. P. C. C. 137.

(*s*) As to what amounts to undue influence in the case of persons of weak intellect, see *Baudains* v. *Richardson*, [1906] A. C. 169, and other cases cited *ante*, p. 33.

(*t*) "Lord Eldon once mentioned his having been concerned in a cause, in which a gentleman who had been some time insane, and was confined at Richmond, had made a will. It was, his Lordship observed, of large contents, proportioning the different divisions with the most prudent care, with a due regard to what he had previously done for the objects of his bounty, and in every respect pursuant to what he declared before his malady he intended to have done; and it was held that he was of sound mind at the time. See 1 Dow, 179" [note by Mr. Jarman]. *Martin* v. *Johnston*, 1 Fost. & Finl. 122; *Nichols* v. *Binns*, 1 Sw. & Tr. 239. In the case of a person found lunatic by inquisition, the reports of the Board of Visitors are not available as evidence to prove the state of his mind at any particular time by reason of section 186 of the Lunacy Act, 1890: *Roe* v. *Nix*, [1893] P. 55.

(*u*) *Mitchell* v. *Thomas*, 6 Moo. P. C. C. 137; 12 Jur. 967; *Durnell* v. *Corfield*, 1 Rob. 51; 8 Jur. 915. But see *Reece* v. *Pressey*, 2 Jur. (N.S.) 380, and compare the cases cited above, p. 31, where the necessity of an *animus testandi* is explained.

(*x*) *Tribe* v. *Tribe*, 1 Rob. 775; 13 Jur. 793; and see *Dufaur* v. *Croft*, 3 Moo. P. C. C. 136; *Harwood* v. *Baker*, *ib.* 282; *In b. Field*, 3 Curt. 752; *Longford* v. *Purdon*, 1 L. R. Ir. 75; *Archambault* v. *Archambault*, [1902] A. C. 575. As to a doctor attesting the will, see *Re Thompson*, 69 Sol. J. 791.

(*y*) *Parker* v. *Felgate*, 8 P. D. 171; *Perera* v. *Perera*, [1901] A. C. 354.

whom or by whose agent it was prepared (*z*), or of a will in favour of a medical attendant in whose house the testator resided (*a*); and the rule requiring strict proof is not confined to these cases, but extends to all cases in which circumstances exist which excite the suspicion of the Court (*b*).

Part of a will may be void and the rest valid.

Where undue influence has been exercised in obtaining gifts by will, the whole will is not necessarily void, but it will be left to the jury to determine what gifts were obtained by undue influence, and such gifts only will be declared void (*c*).

Lunatics.

Mr. Jarman continues (*d*): "A mad or lunatic person cannot, during the insanity of his mind, make a testament of land or goods; but if, during a lucid interval, he make a testament, it will be good (*e*). Lord Hardwicke has observed that fraud and imposition upon weakness may be a sufficient ground to set aside a will of real, much more a will of personal estate (*sed quære* as to this distinction?), although such weakness is not a sufficient ground for a commission of lunacy (*f*). And in *Mountain* v. *Bennet* (*g*), Lord C. B. Eyre laid it down, that although a man may have a mind of sufficient soundness and discretion to manage his affairs in general, yet if such a dominion or influence be obtained over him as to prevent his exercising that discretion in the making his will, he cannot be considered as having such a disposing mind as will give it effect. In this case the will was attempted to be invalidated on the ground that it was obtained by the undue influence of the testator's wife, whom he had married from an inferior station, but the will was finally supported, amidst much conflicting testimony as to the state of the testator's mind, principally on the evidence of the attesting witnesses, who were persons of high character and respectability, and were unanimous as to the testator's sanity and freedom from control.

Fraud or undue influence over a weak mind.

Inquisition *prima facie* evidence of testamentary incapacity.

"It appears, that though an inquisition finding a man a

(*z*) *Low* v. *Guthrie*, [1909] A. C. 278; *Finny* v. *Govett*, 25 T. L. R. 186; *Paske* v. *Ollatt*, 2 Phillim. 323; *Durling* v. *Loveland*, 2 Curt. 225; *Baker* v. *Batt*, 2 Moo. P. C. C. 317; *Parker* v. *Duncan*, 62 L. T. 642; *Brown* v. *Fisher*, 63 L. T. 465.

(*a*) *Jones* v. *Godrich*, 5 Moo. P. C. C. 16; and see *Major* v. *Knight*, 4 No. of Cas. 661; *Cockcraft* v. *Rawles*, *ib.* 237.

(*b*) *Tyrrell* v. *Painton*, [1894] P. 151, *ante*, p. 32.

(*c*) *Trimleston* v. *D'Alton*, 1 D. & Cl. 85; *Hippesley* v. *Homer*, T. & R. 48, n.; *Lord Guillamore* v. *O'Grady*, 2 J. & Lat. 210; *Haddock* v. *Trotman*, 1 Fost. & Finl. 31; *Allen* v. *M'Pherson*, 1 H. L. C. 191; 11 Jur. 785; *Farrelly* v. *Corrigan*, [1899] A. C. 563; *Karunaratne* v. *Ferdinandus*, [1902] A. C. 405.

(*d*) First edition, p. 30.

(*e*) Swinb. P. II, s. 3, pl. 1, 4; *Beverley's Case*, 4 Rep. 123b; *White* v. *Driver*, 1 Phillim. 84; *Brogden* v. *Brown*, 2 Add. 441; *Kemble* v. *Church*, 3 Hagg. 273.

(*f*) 2 Ves. Sen. 408.

(*g*) 1 Cox, 355. In *Thomas* v. *Jones*, 72 Sol. J. 255, the residuary clause in a will was omitted from probate.

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lunatic is *prima facie* evidence of lunacy during the whole period covered by such inquisition, yet it does not preclude proof that the execution of a will, or any other act, occurred during a lucid interval (*h*).

Lucid intervals.

"The principle is very ably stated by Sir W. Wynn in his judgment in *Cartwright* v. *Cartwright* (*i*): 'If you can establish that the party afflicted habitually by a malady of the mind has intermissions, and if there was an intermission of the disorder at the time of the act, that being proved, is sufficient, and the general habitual insanity will not affect it; but the effect of it is this—it inverts the order of proof and of presumption; for, until proof of habitual insanity is made, the presumption is, that the party, like all human creatures, was rational; but where an habitual insanity in the mind of the person who does the act is established, then the party who would take advantage of the fact of an interval of reason must prove it'" (*k*).

In what unsoundness of mind consists.

It has been laid down that the test of a person being of unsound mind in a legal sense is the existence of a delusion (*l*), or a belief in facts which an ordinary person would not credit, or a belief which one cannot understand how any person in his senses should hold; and that mere eccentricity of habits or perversion of feeling and conduct, forming what is termed moral insanity, do not constitute legal incapacity (*m*). General insanity must be distinguished from partial insanity or monomania. In case of the former, a lucid interval, a real absence at the time of making the will, of the disease itself, and not of its apparent delusions only, must be shown (*n*). In case of the latter, opinions have differed. In *Waring* v. *Waring* (*o*) it was laid down by Lord Brougham, that it was incorrect to speak of partial insanity; that a mind unsound on one subject could not be called sound on any; and that unless a lucid interval (as explained above) could be shown, testamentary incapacity was the necessary

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(*h*) *Hall* v. *Warren*, 9 Ves. 605; *In b. Watts*, 1 Curt. 594; and see *Creagh* v. *Blood*, 2 J. & Lat. 509; *Snook* v. *Watts*, 11 Bea. 105; *Cooke* v. *Cholmondley*, 2 Mac. & G. 22; *Bannatyne* v. *Bannatyne*, 16 Jur. 864; *Roe* v. *Nix*, [1893] P. 55. As to deeds, see *Re Walker*, [1905] 1 Ch. 160; *Re Marshall*, [1920] 1 Ch. 284.

(*i*) 1 Phillim. 100; and see 2 *ib.* 465; 2 Add. 209; *Steed* v. *Calley*, 1 Keen, 620; *Tatham* v. *Wright*, 2 R. & My. 1; *Borlase* v. *Borlase*, 4 No. of Cas. 106.

(*k*) The evidence of sanity was held insufficient in *Groom* v. *Thomas*, 2 Hagg. 433.

(*l*) But see *Nichols* v. *Binns*, 1 Sw. & Tr. 239.

(*m*) *Pilkington* v. *Gray*, [1899] A. C. 401; *Freer* v. *Peacocke*, 1 Rob. 442; 11 Jur. 247. See *S. C.* in a previous stage, 3 Curt. 664, where a plea of hereditary insanity was disallowed. See also *Grimani* v. *Draper*, 12 Jur. 925; *Mudway* v. *Croft*, 3 Curt. 671; *Ditchburn* v. *Fearn*, 6 Jur. 201; *Goldie* v. *Murray*, *ib.* 608; *Austen* v. *Graham*, 8 Moo. P. C. C. 493.

(*n*) *Waring* v. *Waring*, 6 Moo. P. C. C. 341; *Smith* v. *Tebbitt*, L. R. 1 P. & D. 398.

(*o*) 6 Moo. P. C. C. 341.

consequence, although the subject on which the unsoundness was manifested might be quite unconnected with the testamentary disposition in question. It is not perfect sanity, however, but only a mind that comprehends the testamentary act, that is required; and in *Banks* v. *Goodfellow* (*p*) Lord Brougham's doctrine, which it was observed was unnecessary to the decision of the cases in which it was stated, was rejected; and it was decided that monomania, which had not, and was not capable of having, any influence on the provisions of a will, did not destroy the capacity to make one; that the inquiry whether the monomania has or not had any such effect might be difficult, but was not impracticable; and that if, in the result, the Court was convinced that it had, the conclusion must be against the will. So, in *Dew* v. *Clark* (*q*), where the Prerogative Court was called upon to decide as to the testamentary capacity of a gentleman named Stott, an eminent medical electrician, who had an only child, against whom he had conceived a strong and groundless aversion, exhibited in a series of absurd acts of harshness and severity, and which he followed up by making a will in favour of some collateral relations, to the almost total exclusion of such only child; Sir J. Nicholl and the Court of Delegates successively pronounced against the validity of the will, after the delivery of very able and elaborate judgments, which should be perused by all inquirers into this interesting subject (*r*). And a like decision was made in the somewhat similar case of *Boughton* v. *Knight* (*s*).

A disposing mind suffices

Beliefs connected with religious subjects may amount to delusions which prove testamentary incapacity (*t*). But the fact that a person believes himself to be commanded by the Deity to carry out some particular work, does not of itself prove that he entertains delusions which incapacitate him from making a valid will (*u*).

Religious delusions.

Lord Thurlow is said to have intimated an opinion, that where lunacy is once established by clear evidence, the party ought to be restored to as perfect a state of mind as he had

(*p*) L. R. 5 Q. B. 549; *Re Bellis*, 45 T. L. R. 452. See also *Smee* v. *Smee*, 5 P. D. 84; *Murfett* v. *Smith*, 12 P. D. 116; *Jenkins* v. *Morris*, 14 Ch. D. 674. In the latter case it was said by Hall, V.-C., that it was immaterial that the monomania was capable of influencing the will, if in fact it had not done so.

(*q*) 3 Add. 79; 5 Russ. 163; and see *Fowlis* v. *Davidson*, 6 No. of Cas. 461. But see *Greenwood's Case*, cited by Lord Erskine in *White* v. *Wilson*, 13 Ves. 89.

(*r*) See the remarks on *Dew* v. *Clark*, in *Smith* v. *Tebbitt*, L. R. 1 P. & D. 398.

(*s*) L. R. 3 P. & D. 64.

(*t*) *Smith* v. *Tebbitt*, *supra*.

(*u*) *Per* Lord Davey in *Hope* v. *Campbell*, [1899] A. C., at p. 14.

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before; but Lord Eldon expressed his dissent from this notion (*v*).

Where there is a question as to the testamentary capacity of a testator, an executor propounding the will does so at his own risk, if he has means of knowing the true state of mind of the deceased (*x*).

The Married Women's Property Act, 1882.

III.—Married Women's Property Act, 1882.—Before 1883 a married woman was in general subject to certain exceptions incapable of making a valid testamentary disposition of real or personal estate (*y*). In this state of the law the Married Women's Property Act, 1882, was passed (*z*). Its material clauses are the following :—Section 1, sub-section 1 : " A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding and disposing by will or otherwise of any real or personal estate as her separate property in the same manner as if she were a feme sole without the intervention of any trustee." Section 2 : " Every woman who marries after the commencement of this Act (*a*) shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid, all real and personal property which shall belong to her at the time of marriage or shall be acquired by or devolve upon her after marriage, including any wages, earnings," etc. Section 5 : " Every woman married before the commencement of this Act shall be entitled to have and to hold, and to dispose of in manner aforesaid as her separate property, all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including wages," etc.

Act does not give general testamentary capacity.

Section 1 is a general or introductory section, which gives the keynote to the subsequent detailed sections of the Act; it does not confer on married women any general testamentary power. It therefore does not enable a woman married before the commencement of the Act to dispose of property by will, unless it was acquired by her after the commencement of the Act, and during the coverture (*b*). But where a married woman having

(*v*) *Ex p. Holyland*, 11 Ves. 10. See further as to lunatics and their acts, *Lord Ely's Case* in D. P. in Irleland, 1784; 1 Ridg. P. C. 515; and the six appendices; Lord Thurlow's celebrated judgment in *Att.-Gen.* v. *Parnther*, 3 Bro. C. C. 441; particularly *Greenwood* v. *Greenwood*, cited *ib.* p. 444; 1 Fonbl. Eq. 46. See also *Niell* v. *Morley*, 9 Ves. 478; *Hall* v. *Warren*, *ib.* 605; *Chambers and Yatman* v. *Queen's Proctor*, 2 Curt. 415; and see 2 De G. & S. 620.

(*x*) *Twist* v. *Tye*, [1902] P. 92; *Page* v. *Williamson*, 87 L. T. 146.

(*y*) The section on coverture under the old law is omitted from this edition.

(*z*) 45 & 46 Vict. c. 75.

(*a*) January 1, 1883.

(*b*) *Re Harris's Settled Estates*, 28 Ch. D. 171; *Re Price*, *ib.* 709.

Capacity outside the Act.

powers of appointment and separate estate, and having, therefore, capacity to make a will, made a will before the commencement of the Act, containing a residuary gift, this was held to pass separate property which she acquired under the provisions of the Act (*c*).

When title accrues.

If a woman married before January 1, 1883, was at that date entitled to property contingently or in reversion, her title to it has already "accrued," and it does not "accrue," so as to make the property her separate property under section 5, by falling into possession after the commencement of the Act (*d*). And the same rule applies where reversionary property is converted from realty into personalty by being sold under a power of sale before the reversion falls into possession (*e*). On the other hand, where a testator who died in 1879 bequeathed property to the persons who should be his next-of-kin in 1886, the title of a married woman who formed one of the class thus ascertained was held to accrue at the latter date (*f*).

Property acquired after coverture.

On the principle already mentioned, it was held that the Married Women's Property Act, 1882, did not enable a married woman, by will made during coverture, to dispose of property which vested in her after her husband's death; to have this operation, her will had to be republished after the determination of the coverture (*g*).

The Married Women's Property Act, 1893.

And now by the Married Women's Property Act, 1893 (s. 3), it is enacted that section 24 of the Wills Act, 1837 (which makes a will speak from the death of the testator), shall apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it, and that such will shall not require to be re-executed or republished after the death of her husband.

This enactment applies to the will of any married woman dying after December 5, 1893, although the will may have been made before that date (*h*).

Gifts for Churches Act, 1803.

It has been decided that the general disposing power given to married women by the Act does not enable them to devise land for the erection of churches under stat. 43 Geo. 3, c. 108 (*i*).

(*c*) *Re Bowen*, [1892] 2 Ch. 291.

(*d*) *Reid* v. *Reid*, 31 Ch. D. 402, overruling *Baynton* v. *Collins*, 27 Ch. D. 604, and *Re Thompson and Curzon*, 29 Ch. D. 177, and affirming *Re Adames' Trusts*, 33 W. R. 834; *Re Tucker*, 33 W. R. 932; and *Re Hobson*, 34 W. R. 195.

(*e*) *Re Bacon*, [1907] 1 Ch. 475.

(*f*) *Re Parsons*, 45 Ch. D. 51; *Re Mudge*, [1914] 1 Ch. 115.

(*g*) *Re Price*, 28 Ch. D. 171; *Re Cuno*, 43 Ch. D. 12. It is hardly necessary to say that if the will was confined to property over which she had a power of appointment, republication would not enlarge its scope so as to make it include property acquired after the coverture: *Re Taylor*, 57 L. J. Ch. 430.

(*h*) *Re Wylie*, [1895] 2 Ch. 116.

(*i*) *Re Smith's Estate*, 35 Ch. D. 589. See *Re Douglas*, [1905] W. N. 7.

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Where a married woman has a contingent power of appointment and makes a will specifically exercising it, and by subsequent events the power is destroyed and the property becomes hers absolutely the will operates as a disposition of the property under section 3 of the Married Women's Property Act, 1893 (*j*).

Trust estates.

By virtue of the Vendor and Purchaser Act, 1874, or the Conveyancing Act, 1881, or the Administration of Estates Act, 1925, land vested in a married woman as sole trustee devolves on her death to her personal representative (*k*).

Devises by aliens.

IV.—Aliens.—At common law, a devise of lands by an alien was at least voidable (*l*); the Crown being entitled, after office found, to seize them in the hands of the devisee, as it might have done in those of the alien during his life. Until office, the lands of an alien remained in him with all the incidental qualities belonging to such estates; on which ground it has been held, that an alien tenant in tail in possession might suffer a common recovery (*m*); and he might, of course, execute its substitute, an enrolled conveyance, and thereby bar the issue in tail and remainders; and, by parity of reasoning, the will of an alien vested his defeasible title in the devisee (*n*); though, if he died intestate, the land escheated to the Crown, or other lord, *pro defectu tenentis*, without any inquest of office, because an alien could have no heirs (*o*). But by section 17 of the British Nationality and Status of Aliens Act, 1914 (which replaces section 2 of the Naturalization Act, 1870 (*p*)), "Real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien in the same manner in all respects as through, from, or in succession to a natural-born British subject. Provided that . . . this section shall not affect (*q*) any estate or interest in real or personal property to which any person has or may become entitled either mediately or immediately in posses-

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(*j*) *Re James*, [1910] 1 Ch. 157.

(*k*) The difficulty caused by the decision in *Re Harkness and Allsopp*, [1896] 2 Ch. 358, was partially removed by the Married Women's Property Act, 1907, s. 1, now replaced by section 170 of the Law of Property Act, 1925.

(*l*) See Shep. Touch. 404. As to what constitutes an alien, see *De Geer* v. *Stone*, L. R. 22 Ch. D. 243, 253.

(*m*) 4 Leon. 84.

(*n*) See Shep. Touch. 404.

(*o*) Co. Litt. 2b.

(*p*) 33 Vict. c. 14, s. 2; not confined to alien friends, as 7 & 8 Vict. c. 66, s. 3.

(*q*) That is, shall not validate or invalidate: *Sharp* v. *St. Sauveur*, L. R 7 Ch. 343.

sion or expectancy in pursuance of any disposition made before the twelfth day of May, 1870, or in pursuance of any devolution by law on the death of any person dying before the Act."

Devises by traitors and felons; —realty.

V.—Traitors and Felons.—Persons attainted of high treason were formerly incompetent to devise their lands, since, by several old statutes (*r*), the real estates of a traitor were, by the attainder, *ipso facto* vested in the Crown.

The lands of all persons attainted for petit treason and felony, formerly escheated to the king or other feudal lord (*s*), by reason of the corruption of blood consequent on attainder, which of course prevented the descent to the heir; and the devises of such persons were absolutely void, or rather, by the better opinion, were voidable, as in the case of an alien (*t*); and such until 1870 was still the case as to persons not entitled to the benefit of the statute 54 Geo. 3, c. 145, which provided, that no attainder for felony, except in cases of high treason, or of the crimes of petit treason (afterwards abolished by statute (*u*)), or murder, or of abetting, procuring, or counselling the same, "shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person or persons, other than the right or title of the offender or offenders, during his, her, or their natural lives only; and that it shall be lawful to every person or persons to whom the right or interest of any lands, tenements, or hereditaments, after the death of any such offender or offenders, should or might have appertained, if no such attainder had been, to enter into the same." Attainder was abolished by 33 & 34 Vict. c. 23.

Wills of traitors and felons; —personalty.

Treason and felony incapacitated persons from making a will of personal estate, which, if vested (either in possession or remainder), became forfeited to the Crown on conviction (*x*); and this incapacity extended to a *felo de se*, who was, however, capable of devising his real estate, as there was in such case no attainder (*y*). In every case of felony in which sentence of death was not recorded, that is to say, in which there was no attainder,

(*r*) See 4 Jarm. Conv. (2nd ed.) 186.

(*s*) Subject to the right of the Crown to hold the lands vested in the person attainted at the period of the attainder for a year and a day: 1 Steph. Com. 417.

(*t*) Shep. Touch. 404.

(*u*) 9 Geo. 4, c. 31, s. 2.

(*x*) 2 Bl. Comm. 499; *Re Thompson's Trusts*, 22 Beav. 506; *Re Bateman's Trusts*, L. R. 15 Eq. 355. *Contra* as to goods which he has as executor of another, of which he may make a will: *In b. Bailey*, 31 L. J. P. 178. *Contra*, also, as to contingent interests, where the felony was not capital: *Stokes* v. *Holden*, 1 Keen, 145; *Barnett* v. *Blake*, 2 Dr. & Sm. 117, 128; and as to personalty acquired by him after a conditional free pardon: *Gough* v. *Davies*, 2 K. & J. 623.

(*y*) *Norris* v. *Chambres*, 29 Bea. 258. See *In b. Bailey*, 31 L. J. P. 178.

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the prisoner's competency to devise or otherwise dispose of his real estate was not affected (*z*).

Attainder and forfeiture for treason or felony abolished.

But the law as to both real and personal property is now regulated by the Forfeiture Act, 1870, which enacts (section 1) that after the passing of it, "no confession, verdict, inquest, conviction, or judgment of or for any treason, or felony, or *felo de se*, shall cause any attainder or corruption of blood, or any forfeiture or escheat; provided that nothing in this Act shall affect the law of forfeiture consequent on outlawry" (*a*). The statute then, after defining (section 6) "convict" to mean any person against whom sentence of death, or of penal servitude, shall have been pronounced or recorded upon any charge of treason or felony; and after providing (section 7) that when any convict shall die, or become bankrupt, or shall have suffered his punishment, original or commuted, or have been pardoned, he shall thenceforth, as to the provisions thereafter contained, cease to be subject to the Act, enacts (section 8) that no action or suit for the recovery of any property shall be brought by any convict during the time that he is subject to the Act, and that every convict shall be incapable during that time of alienating or charging any property, or of making any contract, save as thereinafter provided. Section 9 gives the Crown power to appoint an administrator, in whom, upon his appointment (section 10), all the real and personal property (including choses in action) to which the convict was at the time of his conviction, or shall afterwards, while subject to the Act, become or be entitled, and which, until such appointment, remains in the convict (*b*), vests for all the convict's estate and interest. And the administrator has full power (section 12) to let, sell (*c*), and mortgage the property, and thereout (sections 13 to 17) to pay costs, debts, damages, etc., and to make allowances for the support of the convict and his family. Subject thereto, the administrator is (section 18) to hold the property in trust, and may accumulate the income, for the benefit of the convict and his heirs, or legal personal representatives, or such other persons as may be lawfully entitled thereto, according to the nature thereof; and the same is to revest in the convict on his ceasing to be subject to the Act, or in his heirs or representatives, or

(*z*) *R.* v. *Willes*, 3 B. & Ald. 510; 2 Inst. 55; *R.* v. *Bridger*, 1 M. & Wel. 147; *Re Harrop's Estate*, 3 Drew. 726.

(*a*) Outlawry in civil proceedings is now abolished by the stat. 42 & 43 Vict. c. 59, s. 3.

(*b*) *Ex p. Graves*, 19 Ch. D. 1, 5.

(*c*) See *Carr* v. *Anderson*, [1903] 2 Ch. 279; but the administrator cannot bar a convict's estate tail; *Re Gaskell and Walter's contract*, [1906] 2 Ch. 1. The convict can bar it, in which case the fee simple vests in the administrator. *Ib.*

such other persons as may be lawfully entitled thereto. The convict is to be entitled as against the administrator to all property acquired by him while at large under licence, and, during the same time, his disabilities under section 8 are suspended (section 30).

Effect of the abolition.

Subject, therefore, to the temporary estate of the administrator, and to the charges imposed by the Act, the real and personal property of a traitor or felon remains his own, and he may apparently dispose of it by his will; for the prohibition against alienation during the time that he is subject to the Act, can have no application to his will, whensoever executed; a will being no alienation until the testator's death.

CHAPTER IV.

WHAT MAY BE DEVISED OR BEQUEATHED.

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Personal property vests in the personal representatives.

I.—Preliminary.—Personal property including property over which the testator has exercised a general power of appointment by his will vests in his personal representative (*a*). The title of the legatee is not complete until the personal representatives have assented to the bequest.

Real estate since 1897.

Under section 1 of the Administration of Estates Act, 1925 (which repeals section 1 of the Land Transfer Act, 1897), real estate to which a deceased person was entitled for an interest not ceasing on his death, notwithstanding any testamentary disposition, devolves on his personal representatives. This applies to the real estate appointed by will under a general power or an entailed interest appointed under the power given by section 176 of the Law of Property Act, 1925 (*b*).

Assent.

As regards legal estates in land in the case of wills coming into operation after 1925, a devise does not take effect so as to vest the legal estate in the devisee until there has been an assent in writing in favour of him, but the assent relates back to the death of the deceased (section 36 of the Administration of Estates Act, 1925). Real estate includes trust and mortgage estates, including the fee simple or term of years absolute held by the deceased as a tenant for life under a settlement (section 3 of the Act).

Trust and mortgage estates.

Under the new law the fee simple or term of years absolute which is the subject of a settlement is vested in the tenant for life. By section 22 of the Administration of Estates Act, 1925, a testator is deemed to have appointed as his special executors

Settled land.

(*a*) See Lord Haldane, C., in *Attenborough* v. *Solomon*, [1913] A. C., at p. 82; *Re Hadley*, [1909] 1 Ch. 20.

(*b*) Section 3, sub-section 2 of the Administration of Estates Act, 1925.

in regard to settled land the persons (if any) who are at his death the trustees of the settlement thereof, and probate may be granted to such trustees specially limited to the settled land (*c*).

When the tenant for life dies wholly intestate, administration should similarly be granted to the trustees of the settlement if willing to act (*d*).

Power of testamentary disposition.

II.—What may be devised or bequeathed.—Section 3 of the Wills Act enacts that "it shall be lawful for every person to devise, bequeath or dispose of by his will, executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed or disposed of, would devolve upon the heir at law or customary heir of him, or if he became entitled by descent, of his ancestor, or upon his executor or administrator."

The section authorises any person to dispose of real property or chattels real by will notwithstanding that by reason of illegitimacy or otherwise he did not leave an heir or next-of-kin surviving him (*e*).

Joint estates and interests.

Tried by the rule laid down by section 3 of the Wills Act, it is obvious that a devise or bequest by a joint tenant of real or personal estate is void, in the event of the testator dying in the lifetime of his co-proprietor, whose title by survivorship takes precedence of the claim of the devisee or legatee, as it would of that of the heir or administrator, of the predeceased joint tenant, in case he had died intestate (*f*). If, on the other hand, the testator survives his companion in the tenancy, it is now (*g*) unnecessary to inquire whether the devising joint tenant had become solely seised by survivorship at the period of the execution of his will; it is enough that he had acquired a devisable interest in the estate, at the time of his decease. And the same

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(*c*) As to the meaning of settled land, see *Re Bridgett & Hayes' Contract*, [1928] 1 Ch. 163; *Re Bordass' Estate*, [1929] P. 107; *Re Birch's Estate*, [1929] P. 164.

(*d*) Section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925.

(*e*) Law of Property Act, 1925, s. 178.

(*f*) Co. Litt. 185a. Such a disposition would not work a severance. The power of devising is given by 1 Vict. c. 26, s. 3, only where the property, if not devised, would go to the heir. As to property transferred by a husband into the joint names of himself and his wife, see *Dummer* v. *Pitcher*, 2 M. & K. 262; *Coates* v. *Stevens*, 1 Y. & C. Ex. 66; *Grosvenor* v. *Durston*, 25 Bea. 97; *Turner* v. *Att.-Gen.*, Ir. R. 10 Eq. 386 (property held subject to secret trust).

(*g*) Formerly the efficacy of such a devise or bequest depended on the nature of the property: see the fourth edition of this work, Vol. I, p. 46. As to devise of a freehold interest acquired after execution of a will under the old law on partition or severance, see *Swift* d. *Neale* v. *Roberts*, 1 W. Bl. 476; 3 Burr. 1488.

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rule applies now, as formerly, to bequests of leaseholds or other personal estate.

Tenants in common and coparceners.

"Where the several co-proprietors are tenants in common, or coparceners, each has an absolute power of testamentary disposition over his or her undivided share" (*h*); but since 1925, if land is held in undivided shares, the entirety is subject to a trust for sale (*i*), so that a devise of an undivided share only operates as a devise of the share in the proceeds of sale and in the rents till sale. A devise to several persons in undivided shares operates as a devise in trust for sale (*k*).

Dead body.

A person cannot dispose by will of anything that is not the subject of ownership or property, such as his own body after death (*l*); but he may direct an anatomical examination (*ll*).

Power of tenant in tail in possession to dispose of the property by will *made* after 1925.

III.—Estates tail.—Before 1926 an estate tail which had not been barred, could not be devised. But now, by virtue of section 176 of the Law of Property Act, 1925, a tenant in tail of full age in possession can, by means of a devise or bequest referring specifically either to the property or to the instrument under which it was acquired or to entailed property generally, devise or bequeath the property as if he had barred the entail. The section applies to the owner of a base fee in possession who has power to enlarge the base fee into a fee simple without the concurrence of any other person, but does not extend to a tenant in tail who is by statute restrained from barring his estate tail, or to a tenant in tail, after possibility of issue extinct. The section only applies to wills made, or confirmed or republished after 1925. After 1925 all property may be entailed (*m*) but such estates or interests are equitable (*n*) and are generally referred to as entailed interests.

In the difficult case of *Re Price* (*o*) it was held that a tenant in tail by descent of an undivided share could dispose of that share by a will made before 1926.

(*h*) Mr. Jarman, in the first edition of this work, p. 40. As to coparceners, see Blackstone, Comm. ii, 188.

(*i*) Law of Property Act, 1925, s. 34, First Schedule, Part IV.

(*k*) Section 34, sub-section 3 of the Act.

(*l*) *Williams* v. *Williams*, 20 Ch. D. 659, where the rights of an executor with regard to the dead body of his testator are referred to. See also *R.* v. *Price*, 12 Q. B. D. 247; *R.* v. *Stephenson*, 13 Q. B. D. 331; *Re Dixon*, [1892] P. 386.

(*ll*) See the Act for Regulating Schools of Anatomy, 2 & 3 Will. 4, c. 75, ss. 7, 8.

(*m*) Section 130 of the Law of Property Act, 1925.

(*n*) Section 1 of the Act.

(*o*) [1928] 1 Ch. 579.

Freeholds *pur auter vie.*

IV.—Estates pur auter vie (*p*).—By the Wills Act, s. 3, the previous enactments respecting estates *pur auter vie* were repealed, and the testamentary power is expressly extended to such estates, "whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament"; and by section 6 it is enacted, that if no disposition shall be made of any estate *pur auter vie* of a freehold nature, it shall be assets in the hands of the heir, and that in case there shall be no special occupant of any estate *pur auter vie*, whether freehold or customary freehold, tenant right, customary, or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of a special occupancy or by virtue of the Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate (*q*).

Devise by quasi tenant in tail of estates *pur auter vie.*

Mr. Jarman said in the first edition of this work (*r*): "A question often agitated, but never entirely settled, in regard to the devising power over estates of this description, was whether, where they were limited to the tenant *pur auter vie, and the heirs of his body*, they could be devised without some act on his part to bar the entail. It was admitted on all hands that if the property were undisposed of, it would devolve to the heir special *per formam doni*; it was equally clear that an alienation by

(*p*) The reader may notice that both spellings, *pur auter vie* and *pur autre vie*, occur in the text. Mr. Jarman used the latter spelling. It is a small matter but the editor prefers *pur auter vie*; it is the spelling of Littleton, Coke and Blackstone, and seems to be historically correct. *Pur auter vie* means "for the life of another man" not "for other life" just as *en auter droit* means "in right of another person" not "in other right." *Auter* appears to be a corrupt form of *autrui*, which, Professor Maitland tells us, was the correct word for "another person" in the fourteenth century, as it is in modern French (Introduction to the Year Books published by the Selden Society, p. xlix). Professor Maitland seems to have felt a doubt as to the meaning of phrases *en auter droit* and *pur auter vie* which it is difficult to share, having regard to the way in which Littleton and Coke render them (note by C. Sweet).

(*q*) Where a bastard, having the trust of an estate *pur auter vie* limited to him and his heirs, dies without heir, there being thus no special occupant, the property goes in case of intestacy to the administrator in trust for the Crown: *Reynolds* v. *Wright*, 25 Beav. 100; 2 D. F. & J. 590. Or if there be a will appointing an executor but not disposing of the lease, the executor will hold for his own benefit, unless the will be such as before the Act 1 Will. 4, c. 40, s. 2, constituted him a trustee: *Powell* v. *Merritt*, 1 Sm. & Gif. 381; *Cradock* v. *Owen*, 2 *ib.* 241.

(*r*) Page 55.

deed (*s*) was an effectual bar to the entail; but the doubt was, whether the estate was devisable by will alone, without any such previous alienation. The authorities on the point are few and contradictory. In *Doe* v. *Luxton* (*t*), Lord Kenyon inclined to think that the devise was good; but this dictum stands opposed to that of Lord Redesdale in *Campbell* v. *Sandys* (*u*); and to the decision of Lord Manners in the case of *Dillon* v. *Dillon* (*v*), who held that a quasi tenant in tail of an estate *pur auter vie* could not by devise exclude the title of remainderman, and such was evidently the impression of Sir T. Plumer in *Blake* v. *Luxton* (*x*). The recent statute [1 Vict. c. 26] does not in terms dispose of this debateable point, but has, it should seem, done so in effect, by the language of the general enabling clause, section 3, which extends the devising power to 'all real estate and all personal estate which he (the testator) shall be entitled to, either at law or in equity, at the time of his death, *and which, if not so devised, bequeathed, or disposed of, would devolve upon the* heir at law, *or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator.*'

"The terms of this enactment evidently restrict it to cases in which property, in the absence of disposition, would devolve to the *general* real or personal representatives of the testator, as distinguished from the case now under consideration, in which the devolution would be to the heir *special.*"

Mr. Theobald (Wills (8th ed.), p. 589) doubts whether Mr. Jarman's view as to the effect of section 3 of the Wills Act is correct, and observes that the section extends to an estate *pur auter vie* in copyholds limited to a person without words of limitation, though such an estate did not under the old law

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(*s*) That is, if made by the quasi tenant in tail in possession. "If made by tenant in tail in remainder, it must be with the concurrence of the owner of the previous estate in possession (*Slade* v. *Pattison*, 5 L. J. (N.S.) Ch. 51; *Allen* v. *Allen*, 2 D. & War. 307, 332; *Edwards* v. *Champion*, 3 D. M. & G. 202), and could never, therefore, be made by will" (editor's note, 4th ed.).

(*t*) 6 T. R. 293.

(*u*) 1 Sch. & Lef. 281.

(*v*) 1 Ball & Bea. 77. The editors of earlier editions substituted for *Dillon* v. *Dillon* a reference to the case of *Hopkins* v. *Ramage* (Batty, 365), and added: "The decision of Lord Manners in *Dillon* v. *Dillon*, 1 Ba. & Be. 77, does not touch the question, for the quasi tenant in tail died without issue, and therefore, at her death, there was nothing for the will to operate upon, and the learned Judge expressly rested his decision on this fact. In *Hopkins* v. *Ramage* the circumstances were precisely similar, but the opinion of the Court was expressed in general terms."

(*x*) Coop. 185. "And of Sir E. Sugden in *Allen* v. *Allen*, 2 D. & War. 307, 326. So in *Re Barber's Settled Estates*, L. R. 18 Ch. D. 628, Fry, J., said that 'the analogy of a fee simple estate is to be applied as far as it can be, both as to the capacity and incapacity of alienation of an estate *pur auter vie*'" (additions made by the editors in earlier editions of this work). And see *Re Michell*, [1892] 2 Ch. 87.

devolve on the heir or executor of the owner (*y*). Mr. Hayes (Conv. 1, 198) agrees with Mr. Jarman.

Leases for lives with a covenant for perpetual renewal are not uncommonly met with in Ireland (*z*).

Renewable leases for lives.

V.—Incorporeal Hereditaments.—Existing rights of this nature, so far as they are alienable, can apparently be the subject of a devise. Thus a rentcharge, a seignory (*a*), or an advowson (*b*), or right of common in gross, can clearly be devised (*c*). Of course a right which is inseparable from a tenement (such as an easement or right of common for cattle levant and couchant) cannot be disposed of by will except with the tenement (*d*), or (in the case of an easement) by being devised to the owner of the servient tenement so as to be extinguished (*e*).

Devise of existing rights.

It seems equally clear that a rentcharge, easement, *profit à prendre* or similar right, which can be created by grant, can be created by devise *de novo* (*f*).

Creation *de novo*.

A way of necessity may be impliedly created by a devise of land (*g*), and the doctrine as to the creation of implied easements by the contemporaneous grant of adjoining pieces of land applies to devises (*h*).

Implication.

VI.—Choses in Action.—Legal choses in action, such as debts, may be disposed of by will (*i*), and if they are given specifically, it is the duty of the executors to get them in and hand them over to the legatee (*k*). The Wills Act does not enable the legatee to sue for them in his own name (*l*).

Legal choses in action.

(*y*) *Zouch* v. *Forse*, 7 East, 186.

(*z*) *Roddy* v. *Fitzgerald*, 6 H. L. C. 823; *Prentice* v. *Brooke*, 5 L. R. Ir. 435. Perpetually renewable leases in England are now converted into leases for 2,000 years by virtue of Part VII of the Law of Property Act, 1922, and the Fifteenth Schedule to that Act.

(*a*) As to what will pass by the devise of a manor, see *post*, p. 1266.

(*b*) As to devises of advowsons, see *Earl of Albemarle* v. *Rogers*, 7 Bro. P. C. 522; *Briggs* v. *Sharp*, L. R. 20 Eq. 317; *Johnstone* v. *Baber*, 6 D. M. & G. 439, and cases cited *post*, p. 1265.

(*c*) For an enumeration of purely incorporeal hereditaments (which alone are here considered), see Williams on Real P. (20th ed.) 410; Challis, Real P. 45. To these may be added the right of appointing the principal or master of a hospital or school, granted by the Crown to a man and his heirs: *Atkins* v. *Mountague*, Cases in Ch. 214; *Att.-Gen.* v. *Brentwood School*, 3 B. & Ad. 59.

(*d*) Williams on Commons.

(*e*) Easements and other rights appendant or appurtenant were formerly not considered hereditaments, but they are now always so treated: see an article by C. Sweet in Law Quarterly Review, xxiv, 259.

(*f*) *Booth* v. *Smith*, 14 Q. B. D. 318. See also *Taws* v. *Knowles*, [1891] 2 Q. B. 564.

(*g*) *Pearson* v. *Spencer*, 1 B. & S. 571; 3 B. & S. 761.

(*h*) *Phillips* v. *Low*, [1892] 1 Ch. 47; *Milner's Safe Co.* v. *Great Northern and City Ry.*, [1907] 1 Ch. 208.

(*i*) *Re Prater*, 37 Ch. D. 481.

(*k*) *Re Robson*, [1891] 2 Ch. 559.

(*l*) *Bishop* v. *Curtis*, 18 Q. B. 878.

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Government securities.

Money in the public funds, bonds of foreign governments, and other so-called government securities, are not choses in action in the strict sense, because no action lies to enforce them, but there is no doubt that they are personal property (*m*), and can therefore be disposed of by will.

Life insurance.

A person who effects a policy of insurance on his own life can *prima facie* dispose of it by his will (*n*). Whether a specific bequest of a policy confers such a "derivative title" as to enable the legatee to sue for the policy moneys in his own name under the Policies of Assurance Act, 1867, does not seem to have been decided.

Non-bequeathable policy.

A person effecting an insurance on his own life may by the terms of the contract restrict his right to dispose of the policy by will (*o*), or may debar himself altogether from the right of testamentary disposition (*p*).

Friendly society.

A nomination by a member of a friendly or industrial society (*q*) cannot be revoked by will, and if a nomination is in force at the death of the member, the money forms no part of his estate (*r*).

Torts.

As regards rights of action for tort, the general rule of the common law is that "actio personalis moritur cum persona." In a few cases at common law, and in several cases by statute, the personal representatives of a deceased person can sue for injuries to his property, and, under Lord Campbell's Act, for a personal injury causing his death. In the latter case the damages recovered do not form part of the deceased's estate (*s*).

Equitable choses in action.

In certain cases an equitable chose in action may be disposed of by will. Thus where a conveyance has been executed under circumstances which would give the grantor a right in equity to have it set aside, such a right is clearly devisable (*t*).

Locality of choses in action.

The question whether a gift of "property" or "estate" in a particular place includes choses in action is often a difficult one. A gift of property in a particular district or country (whether in England or abroad) passes money arising from real estate situate

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(*m*) See *Ex p. Huggins*, 21 Ch. D. 90.

(*n*) See *Re Phillips*, 23 Ch. D. 235.

(*o*) *Re Davies*, [1892] 3 Ch. 63.

(*p*) See *Att.-Gen.* v. *Rowsell*, 36 Ch. D. 67, n.; *Urquhart* v. *Butterfield*, 37 Ch. D. 357, and cases there cited. They are referred to in the fifth edition of this work, p. 62.

(*q*) See *ante*, p. 38. Friendly Societies Act, 1896; Provident Nomination and Small Intestacies Act, 1883: Industrial and Provident Societies Acts, 1893 to 1913. See *Eccles Provident Industrial Society, Ltd.* v. *Griffiths*, [1912] A. C. 483.

(*r*) *Bennett* v. *Slater*, [1899] 1 Q. B 45.

(*s*) See Pollock on Torts (12th ed.), p. 66.

(*t*) *Uppington* v. *Bullen*, 2 Dr. & War. 184; 1 Con. & L. 291; *Stump* v. *Gaby*, 2 D. M. & G. 623; *Gresley* v. *Mousley*, 4 De G. & J. 78.

there (*u*), and debts owing by persons resident there (*x*), and apparently stocks and shares which are only transferable there. In the case of shares which can be transferred either in England or in a foreign country on production of the share certificate, it seems that their locality is governed by the certificate : if it is in England at the time of the testator's death, the shares will be considered as situate in England (*y*).

Property in the United Kingdom.

In *Favorke* v. *Steinkopff* (*z*), a testator, whose domicil was English, by his will directed his trustees to invest a certain sum in the Hamburg State Loan and out of the income to pay certain annuities and, as the annuities fell in, to apply the income and capital so set free in accumulating a trust fund which was also invested in the Hamburg State Loan. The annuitants and those interested in the trust fund were German nationals. It was held that the interests of the beneficiaries under the will were " property rights and interests " in the United Kingdom and so were charged under the Treaty of Peace Order, 1919.

Choses in action in a house, etc.

How far a gift of " property " in a house, box, cabinet, etc., is effectual to pass choses in action, has been discussed in several cases. In *Re Prater* (*a*), a testator bequeathed " my property at R.'s bank "; at the time of his will and of his death he had at R.'s bank in Paris a cash balance and certificates of shares in French companies which apparently entitled any person holding them to the ownership of the shares : it was held that the cash balance and the shares passed by the bequest.

This question is also discussed in the chapter on Legacies, with reference to bequests of personal property in a particular place.

Contract to purchase land.

Where a person contracts to purchase land, this is an interest which he can devise by will (*b*).

But, in the absence of a contrary intention (*c*) the devisee (since the Real Estate Charges Act, 1877) takes subject to the

(*u*) *Tyrone* v. *Waterford*, 1 D. F. & J. 613; *Guthrie* v. *Walrond*, 22 Ch. D. 573.

(*x*) *Nisbett* v. *Murray*, 5 Ves. 149; *Arnold* v. *Arnold*, 2 My. & K. 365; *Guthrie* v. *Walrond*, *supra*; *Re Clark*, [1904] 1 Ch. 294.

(*y*) *Re Clark*, [1904] 1 Ch. 294. The question is discussed more in detail in Chap. XXX, where *Re Clark* is stated, *post*, p. 1050.

(*z*) [1922] 1 Ch. 174.

(*a*) 37 Ch. D. 481. See *Re Robson*, [1891] 2 Ch. 559, where *Roberts* v. *Kuffin*, 2 Atk. 112, was also referred to. A gift of a " house and its contents " does not, *prima facie*, pass title deeds and share certificates : *Re Craven*, 99 L. T. 390; *post*, p. 1050.

(*b*) *Morgan* v. *Holford*, 1 Sm. & G. 101. It is hardly necessary to say that only contracts which are legally binding are here referred to : see *Lacon* v. *Mertins*, 3 Atk. 1; *Rose* v. *Cunynghame*, 11 Ves. 550; *Buckmaster* v. *Harrop*, 7 Ves. 341.

(*c*) In *Re Rix*, 125 L. T. 216, a direction in the will excluded the application of the Real Estate Charges Act, 1877.

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lien for unpaid purchase-money (*d*). The Real Estates Charges Acts (commonly known as Locke King's Acts) have since been replaced by section 35 of the Administration of Estates Act, 1925. See Chap. LIV, VI.

Contract not binding.

But even before 1878, if from a defect of title or any other cause the contract was not obligatory on the purchaser at his death, his heir or devisee was never entitled to say he would take the estate with its defects, or have the purchase-money laid out in the purchase of another. Thus in *Broome* v. *Monck* (*e*), which was a case of defective title, Lord Eldon observed that the cases establish, that whatever is the state of liability of the party himself at his death, must be the state of liability to be considered upon questions between those representing him after his death (*f*); and if at his death he could not be compelled to take, clearly the heir could not say to the executor, "I will have the estate and shall pay you for it."

Contract for sale of land.

The converse case of a testator entering into a contract for the sale of land devised by his will, often gives rise to the question whether the contract operates as a revocation of the devise. This question is discussed in Chap. XXII.

Right of residence or occupation.

VII.—Miscellaneous Rights and Interests.—A testator may give to A the right of residing in or occupying a particular house or other property rent free, in terms which show that the right is personal to A and cannot be assigned by him to another (*g*). A is, however, a tenant for life within the meaning of the Settled Land Act, 1925 (*h*), and his powers under the Act cannot be restricted by any clause of forfeiture (*i*).

But where a testator bequeathed a leasehold house to trustees to permit his wife to occupy the same during her widowhood with a provision for the payment of ground rent, rates, taxes and outgoings, execution of repairs and performance of covenants out of his general estate, and the widow sold the house under her power as a tenant for life, it was held that the widow was not entitled to any payment in lieu of the provision for payment of rent and outgoings (*k*) as that provision was held not to fall within section 51 of the Settled Land Act, 1882.

(*d*) *Re Cockcroft*, 24 Ch. D. 94; *Re Kidd*, [1894] 3 Ch. 558.

(*e*) 10 Ves. 597. See also 1 Ves. 218; *Green* v. *Smith*, 1 Atk. 572; *O'Shea* v. *Howley*, 1 J. & Lat. 398. In such a case, unless the purchaser waives his objection, there can be no conversion: *Re Thomas*, 34 Ch. D. 166.

(*f*) See acc. *Curre* v. *Bowyer*, 5 Bea. 6, n.; *Ingle* v. *Richards*, 28 Bea. 365; *Haynes* v. *Haynes*, 1 Dr. & Sm. 451, 452; *Hudson* v. *Cook*, L. R. 13 Eq. 417; *Lysaght* v. *Edwards*, 2 Ch. D. 516.

(*g*) *May* v. *May*, 44 L. T. 412; *Maclaren* v. *Stainton*, 27 L. J. Ch. 442; *Parker* v. *Parker*, 1 N. R. 508.

(*h*) *Re Trenchard*, [1902] 1 Ch. 378; *Re Llanover*, [1903] 2 Ch. 16.

(*i*) *Post*, p. 1520.

(*k*) *Re Simpson*, [1913] 1 Ch. 277. Compare *Re Ames*, [1893] 2 Ch. 479.

The cases in which a devise of the use and occupation of land gives the devisee an estate are considered elsewhere (*l*).

Option of purchase.

A testator may give a person the right of purchasing property forming part of the testator's estate, either at a price named by the testator, or at a price to be fixed by the executors, or by valuation or otherwise (*m*). If the price is to be fixed by the executors, they are bound to fix a reasonable price (*n*), but the Court will not interfere if they act in good faith (*o*). If any terms are imposed by the testator as to time, etc., they must be strictly complied with, otherwise the right will be lost (*p*); but if the offer is to be made by the executors, time is reckoned from the date when a complete offer is made (*q*).

Rights conferred by option.

It is not clear to what extent the ordinary law of vendor and purchaser applies to a purchase under an option. It seems that the person exercising the option is not necessarily entitled to an abstract of title, and even if he is, the terms of the will may be such that failure on the part of the executors to deliver an abstract will not absolve him from complying with the requirements of the will as to time (*r*). On the other hand, it has been decided that, in the absence of a direction to the contrary, he is entitled to have the property free from incumbrances (*s*).

Whether personal or transmissible.

An option of purchase given by will to A B is *prima facie* personal to him, and does not pass to his executors on his death (*t*), but the will may be so expressed as to confer a transmissible interest (*u*). It seems clear that if an option of purchase is not personal to the donee, its exercise must be confined to the period allowed by the Rule against Perpetuities (*x*).

Compulsory purchase.

If a testator gives an option of purchase at a fixed price, and after his death the property is sold at a higher price under the compulsory powers of the Lands Clauses Act, the donee of the option is entitled to the difference (*y*). A similar rule applies if the sale is by order of the Court (*z*).

(*l*) *Post*, p. 1265.

(*m*) *Radnor* v. *Shafto*, 11 Ves. 448; *Waite* v. *Morland*, 12 Jur. (N.S.) 763.

(*n*) *Radnor* v. *Shafto*, *supra*.

(*o*) *Edmonds* v. *Millett*, 20 Bea. 54.

(*p*) *Dawson* v. *Dawson*, 8 Sim. 346; *Brooke* v. *Garrod*, 3 K. & J. 608; 2 De G. & J. 62; *Austin* v. *Tawney*, L. R. 2 Ch. 143.

(*q*) *Lilford* v. *Keck*, 30 Bea. 295; *Austin* v. *Tawney*, *supra*.

(*r*) *Brooke* v. *Garrod*, *supra*.

(*s*) *Given* v. *Massey*, 31 L. R. Ir. 126; *Re Wilson*, [1908] 1 Ch. 839. See *Re Davison and Torrens*, 17 Ir. Ch. 7. As to the cases on rights of pre-emption not conferred by will, see Sugden on V. & P. 188, n.; Dart's V. & P. 240 (6th ed.).

(*t*) *Re Cousins*, 30 Ch. D. 203 As to an option contained in a lease, see *Re Adams and Kensington Vestry*, 27 Ch. D. 394; *Friary, Holroyd* v. *Singleton*, [1899] 2 Ch. 261.

(*u*) *Belshaw* v. *Rollins*, [1904] 1 Ir. R. 284.

(*x*) *L. & S. W. R.* v. *Gomm*, 20 Ch. D. 562.

(*y*) *Re Cant's Estate*, 4 De G. & J. 503.

(*z*) *Re Kerry*, [1889] W. N. 3; 5 T. L. R. 178.

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Right of selection.

A gift to A of such part of a certain property as shall be selected by him is valid (*a*). The right is a personal one, and therefore it would seem that if A survives the testator and dies before selecting, the right is gone (*b*). But this would probably not be so where the part to be selected is indefinite and unrestricted, for then the gift is equivalent to a gift of the whole property (*c*).

Executory and contingent interests.

An executory or contingent interest in real or personal estate is disposable by will, if the nature of the contingency on which it is dependent be such that the interest does not cease with the life of the testator; in other words, if it be descendible or transmissible. This doctrine, in regard to real estate, was recognised in *Goodtitle* v. *Wood* (*d*), and was finally established in *Roe* d. *Perry* v. *Jones* (*e*) by the Court of K. B., Lord Kenyon, C.J., drawing a distinction between such an interest and a mere possibility like that which an heir has from his ancestor. Buller, J., observed, that if it was such an interest as was descendible, it was also devisable, as they must both be governed by the same principle. The converse of this proposition is equally true, namely, that an interest which is not transmissible cannot be devised (*f*). A contingent interest in personal property can be bequeathed by will if it is transmissible (*g*). As regards wills made since the year 1837, the statute of 1 Vict. c. 26, s. 3, has expressly provided that the testamentary power conferred by it "shall extend to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may have become vested."

Spes successionis.

"A *spes successionis* is not a title to property by English law" (*h*).

A condition binding land may be created by devise (*i*). A right of pre-emption cannot be given so as to override the

(*a*) See the cases cited *post*, p. 435.

(*b*) See Co. Litt. 145a; *Re Madge*, 72 Sol. J. 284.

(*c*) See *Arthur* v. *Mackinnon*, 11 Ch. D. 385, *post*, p. 437.

(*d*) Willes, 211; *S. C.* cited 3 T. R. 94.

(*e*) 1 H. Bl. 30; *S. C.* in B. R. 3 T. R. 88; and see *Moor* v. *Hawkins*, 2 Eden, 342; Fearne, C. R. 366; *Selwyn* v. *Selwyn*, Burr. 1131; *Perry* v. *Phelips*, 17 Ves., at p. 182; *Ingilby* v. *Amcotts*, 21 Bea. 585, which also explains the sense in which "descendible" is to be here understood.

(*f*) The case of *Doe* v. *Tomkinson*, 2 M. & Sel. 165, cited by Mr. Jarman in support of the latter proposition, occurred under the old law.

(*g*) *Pinbury* v. *Elkin*, 1 P. W. 563; *Re Cresswell*, 24 Ch. D. 102; and other cases referred to *post*, p. 1326.

(*h*) *Per* Kay, J., in *Re Parsons*, 45 Ch. D., at p. 56, where *Davis* v. *Angel*, 4 D. F. & J. 524, is referred to. See also *Allcard* v. *Walker*, [1896] 2 Ch. 369, at p. 380. As to the Irish case of *Re Beaupré's Trusts* (21 L. R. Ir. 397), see *Re Parsons*, *supra*; *Re Chichester's Estate*, [1908] 1 Ir. R. 297; *Re Butler*, [1918] 1 Ir. R. 394.

(*i*) *Wigg* v. *Wigg*, 1 Atk. 382; *Warren* v. *Lee*, Dyer, 126b; *Re Kirk*, 21 Ch. D. 131, *post*, p. 1435.

trusts for sale where land is devised in undivided shares. It is not an additional or larger power conferred upon the trustees for sale within section 28, sub-section 1 of the Law of Property Act, 1925, as amended by the Law of Property (Amendment) Act, 1926, Schedule, but a restriction upon the trust for sale (*k*).

As to rights of action and entry.

Rights of action (*l*) and entry (*m*) were not, under the old law, devisable, but the Wills Act has expressly extended the testamentary power to "all rights of entry for conditions broken and other rights of entry," so that a possibility of reverter is now devisable (*n*). And as to rights of action, the question cannot recur since the statute 3 & 4 Will. 4, c. 27, s. 36, abolishing real actions.

Possibility of reverter.

Possession *de facto*.

Possession without title confers a devisable interest, which may be defended and recovered by the devisee against all but the true owner (*o*).

Profit costs.

When a testator appoints a solicitor to be executor or trustee of his will, he sometimes empowers him to charge for services rendered by him in performing the duties of his office. Whether the right to make such charges is confined strictly to professional services or extends to other matters, depends on the language of the will (*p*).

The right to charge profit costs is in the nature of a legacy (*q*), and the solicitor forfeits it by attesting the will (*r*).

Where will takes effect *ex post facto*.

In some cases (apart from the doctrine of powers) property passes under the will of a testator, although it never belonged to him. Thus where a gift of real or personal property by will to a child of the testator is preserved from lapse by section 33 of the Wills Act, and the child has left a will containing a sufficient residuary gift, the property bequeathed or devised to the child by the father's will passes under the residuary gift in the child's will (*s*). A similar result follows when personal property is expressly given by will to A, and in the event of his predeceasing the testator, then to his executors as part of his personal estate.

(*k*) *Re Flint*, [1927] 1 Ch. 570.

(*l*) *Baker* v. *Hacking*, Cro. Car. 387, 405. See also *Doe* d. *Cooper* v. *Finch*, 1 Nev. & M. 130; 4 B. & Ad. 283.

(*m*) *Goodright* v. *Forrester*, 8 East, 564; 1 Taunt. 578. See also *Cave* v. *Holford*, 3 Ves. 669; *Att.-Gen.* v. *Vigor*, 8 Ves. 282; *Doe* d. *Souter* v. *Hull*, 2 D. & Ry. 38; *Culley* v. *Doe* d. *Taylerson*, 11 Ad. & Ell. 1020; *Bunter* v. *Coke*, Salk. 237.

(*n*) See *Pemberton* v. *Barnes*, [1899] 1 Ch. 544. See the argument in *Leach* v. *Jay*, 6 Ch. D. 496; 9 Ch. D. 42.

(*o*) *Asher* v. *Whitlock*, L. R. 1 Q. B. 1; *Clarke* v. *Clarke*, Ir. R. 2 C. L. 395; *Hawksbee* v. *Hawksbee*, 11 Ha. 230.

(*p*) See *Re Fish*, [1893] 2 Ch. 413, and the cases there cited; *Clarkson* v. *Robinson*, [1900] 2 Ch. 722; *Re Wertheimer*, 106 L. T. 590 (art expert).

(*q*) *Re Thorley*, [1891] 2 Ch. 613.

(*r*) *Post*, p. 84.

(*s*) *Johnson* v. *Johnson*, 3 Ha. 157, and the other cases referred to *post*, pp. 421 *seq.*, where the operation of the section is considered in detail.

and A predeceases the testator, leaving a will containing a sufficient residuary bequest (*t*).

It is hardly necessary to say that personal property limited by settlement merely to the executors or administrators of the settlor may be disposed of by his will, since he himself takes absolutely under such a limitation (*u*).

So if land is limited, by virtue of a shifting clause, to A, and before it takes effect A dies intestate, leaving B his heir, and B dies, having made a will containing a general devise of real estate, and then the shifting clause takes effect, the land passes by the devise (*x*).

Real estate.

VIII.—Operative Words of Testamentary Disposition.—The appropriate word for disposing of land and other real estate is "devise," but of course any word indicating that intention, such as "bequeath," although more properly applicable to personalty, is sufficient (*y*). A difficulty as to the intention in such cases arises where the gift is referential. Thus in *Jackson* v. *Hosie* (*z*), a testator made various specific dispositions of real and personal property, and went on to direct that as to the residue of the property "not hereinbefore specifically bequeathed," it should be divided rateably among certain persons in proportion to "the bequests hereinbefore specifically given" to them: it was held that these words included devisees of real estate, although the testator had in other parts of his will used the word "devise" in disposing of his real estate. But an appointment of a person as "my residuary legatee" will only give him the testator's personal estate, unless an intention to dispose of the realty is apparent (*a*). An appointment of a person as "executor of all my property," or the like, may operate to pass land to him, either beneficially or as trustee (*b*).

"I make A. B. my heir."

An appointment or acknowledgment of a person as the testator's heir may operate as a general devise of his real estate (*c*).

(*t*) *Long* v. *Watkinson*, 17 Bea. 471; *Re Clay*, 54 L. J. Ch. 648. See *post*, p. 401.

(*u*) *Morris* v. *Howes*, 4 Hare, 599; *Mackenzie* v. *Mackenzie*, 3 Mac. & G. 559.

(*x*) *Ingilby* v. *Amcotts*, 21 Bea. 585.

(*y*) *Re Gibbs*, [1907] 1 Ch. 465.

(*z*) 27 L. R. Ir. 450. See *Hope* v. *Taylor*, 1 Burr. 268, stated *post*, p. 974 ("legacy" held to include devise of land).

(*a*) *Re Gibbs*, *supra*, and other cases cited *post*, p. 976.

(*b*) See *Doe* v. *Haslewood*, 6 Ad. & E. 167, and other cases cited *post*, pp. 963 *seq.*

(*c*) In *Spark* v. *Purnell* (Hob. 75), a testator devised part of his lands to Anthony, and part to William, and willed that if either should die, one of them should be the other's heir. The Court said: "If by my will I appoint that J. S., shall be heir of my land, he shall have it in fee; for such estate as the ancestor hath such he is to inherit. And, therefore, the said word (heir)

The use of the word "devise" is not essential to pass land by will. Any words indicating an intention to confer an absolute interest are sufficient; as when a testator willed land to the discretion of his father (*d*). So an absolute devise is not cut down by a superadded power of appointment (*e*), even if it is in favour of a class (*f*).

In *Banbury* v. *Doran* (*g*) a disposition of land in terms appropriate to a gift *inter vivos* was held to operate as a devise.

Personalty.

The appropriate word for disposing of personal property, including leaseholds, is "bequeath," but the word "devise" was formerly used as an operative word for bequeathing personalty (*h*), and of course may at the present time be so used, if the intention is clear (*i*).

Appointment as residuary legatee.

It is clear that if a testator appoints a person to be his residuary legatee, that will give him all the testator's residuary personal estate. The contest in such cases generally is, whether the words are sufficient, with the aid of the context, to pass the real estate (*k*).

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in the latter clause, between William and Anthony, shall give him an estate for life to the survivor, because the brother to whom he is made heir, had but an estate for term of life before." See *Tilly* v. *Collyer*, *Tayler* v. *Web*, *post*, p. 603.

(*d*) *Whiskon and Cleyton's Case*, 1 Leon. 156.

(*e*) *Doe* d. *Herbert* v. *Thomas*, 3 A. & E. 123.

(*f*) *Brook* v. *Brook*, 3 Sm. & G. 280; *Howarth* v. *Dewell*, 29 Bea. 18.

(*g*) Ir. R. 9 C. L. 284.

(*h*) *Ewer* v. *Corbet*, 2 P. W. 148; *Rider* v. *Wager*, 2 P. W. 328.

(*i*) See *Re Lowman*, [1895] 2 Ch. 348, and other cases cited *post*, p. 1221.

(*k*) *Windus* v. *Windus*, 21 Bea. 373; *Hughes* v. *Pritchard*, 6 Ch. D. 24; *Re Gibbs*, [1907] 1 Ch. 465; and other cases cited *post*, pp. 975 *seq.*

CHAPTER V.

WHO MAY BE DEVISEES OR LEGATEES.

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Mortmain, etc., Act, 1888.

I.—Corporations.—The Mortmain and Charitable Uses Act, 1888, s. 1, which passed into law on August 13, 1888, enacts that, "(1) Land shall not be assured to or for the benefit of, or acquired by or on behalf of any corporation in mortmain, otherwise than under the authority of a licence from Her Majesty the Queen, or of a statute for the time being in force, and, if any land is so assured otherwise than as aforesaid, the land shall be forfeited to Her Majesty from the date of the assurance, and Her Majesty may enter on and hold the land accordingly." Sub-section 2 of the same section provides that where the land is held of one or more mesne lords under Her Majesty, each mesne lord is to have the right of entering on and holding the land within a certain time, but the right of each superior lord is only to be exercised if the inferior lord fails to exercise his right of entry within the proper time. Section 2 enacts that, "It shall be lawful for Her Majesty the Queen, if and when and in such form as she thinks fit, to grant to any person or corporation a licence to assure in mortmain land in perpetuity or otherwise, and to grant to any corporation a licence to acquire land in mortmain, and to hold the land in perpetuity or otherwise" (*a*). In this Act, unless the context otherwise requires, "assurance" includes a gift, devise, bequest, or other assurance by will, and "assure" and "assuror" have corresponding meanings; and "land" includes tenements and hereditaments corporeal and incorporeal of whatever tenure and any estate or interest in land (*b*).

(*a*) This section is a partial re-enactment of section 1 of stat. 7 & 8 Will. 3, c. 37, but it omits the important words "of whomsoever the same shall be holden," and fails to re-enact section 2 of the same statute, protecting from forfeiture lands aliened in pursuance of a licence so granted.

(*b*) This definition has been repealed and another substituted by the Mortmain, etc., Act, 1891; see *post*, p. 79.

The Act also provides (section 12) that "Nothing in this Act shall affect the operation or validity of any charter, licence, or customs in force at the passing of this Act enabling land to be assured or held in mortmain." The definition of land was repealed by section 3 of the Mortmain and Charitable Uses Act, 1891; and instead, land is defined to include tenements and hereditaments, corporeal or incorporeal of any tenures, but not money secured on land or other personal estate arising from or connected with land.

Definition of land.

By section 6 of the Act of 1888 testamentary gifts of land for public parks, schoolhouses for elementary schools and public museums are, under certain conditions, exempt. There are numerous exemptions by Act of Parliament (*c*) as well as the exemptions contained in section 6 of the Mortmain and Charitable Uses Act, 1888. Thus assurances of land to the Universities of Oxford and Cambridge or any college of such university are exempt by section 60 of the Universities of Oxford and Cambridge Act, 1877, extended by section 9 of the Universities of Oxford and Cambridge Act, 1923. The public schools to which the Public Schools Act, 1868, applies can hold lands for the purpose of the school without a licence in mortmain by section 2 of the Public Schools Act, 1869. Land assured for educational purposes is exempt (*d*).

Exemptions.

It will of course be remembered that a power to hold land does not of itself empower a corporation to acquire land for charitable purposes. The two questions are quite distinct (*e*).

The Companies (Consolidation) Act, 1908, enacts (section 16) that every company incorporated in accordance with the provisions of the Act shall have power to hold lands; and (section 19) that a company formed for the purpose of promoting art, science, religion, charity, or any other like object, not involving the acquisition of gain by the company or by its individual members, shall not, without the licence of the Board of Trade, hold more than two acres of land; but the Board of Trade may by licence empower any such company to hold lands in such quantity, and subject to such conditions, as they think fit. The use in these sections of the word "hold," without any word giving a power to acquire land, suggests a doubt whether a devise of land to a trading company by a testator not licensed to alien lands in mortmain would be valid, even if the company would have had power to purchase the land for the purpose of its business. But to hold such a devise void would be taking

Companies Act, 1908

(*c*) On this subject see Tyssen on Charitable Bequests.
(*d*) Education Act, 1921, s. 117.
(*e*) See *post*, p. 238.

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a highly technical view of the Act, for it is admitted that a company formed under the Act can purchase land, and that being so there is no reason why it should not be able to take by devise.

Corporations sole.

Questions on gifts by will to corporations sole do not often arise. They seem to labour under the same general incapacity to hold land without a licence in mortmain as corporations aggregate (*f*). It seems that since the passing of the Mortmain, etc., Act, 1891, land can be validly devised to a corporation sole (such as a rector or vicar) upon charitable trusts, but it must be sold in accordance with the Act (*g*).

A devise to a corporation sole when the office is vacant, or to a corporation aggregate when the office of the head is vacant, is valid by virtue of section 180, sub-section 2, of the Law of Property Act, 1925 (*h*).

Quasi-corporations.

A registered trade union, although not a corporation, is "a legal entity," and may be sued in its registered name (*i*). But a devise of land to such a society is invalid (*k*).

Voluntary association.

A gift by will to a voluntary society or association of persons, such as a club, for their own benefit, is clearly good. But if it is upon trust for future members of the association it is clearly bad (*l*).

Aliens.

II.—Aliens.—The incapacity of alienage was removed by the Naturalization Act, 1870, which is now replaced by the British Nationality and Status of Aliens Act, 1914, section 17. For the law prior to 1870 see the earlier editions of this work.

Foreigners.

As regards disabilities imposed on aliens by the laws of their own countries, the general rule seems to be that the English Courts disregard all personal disabilities and disqualifications unknown to English law (*m*).

Gifts to attesting witnesses.

III.—Gifts to Attesting Witnesses.—Under the Statute of Frauds a devise of land was required to be attested by "credible" witnesses, a character which persons having a beneficial interest under the will were held not to sustain, and

(*f*) Co. Litt. 2 b. Under the School Sites Act, 1841, and other Acts, corporations sole can hold land conveyed to them by deed.

(*g*) *Re Scowcroft*, [1898] 2 Ch. 638. The question whether land can be conveyed to a corporation sole for any purpose not directly connected with his office has been much discussed, but apparently never decided.

(*h*) This removed a doubt which is discussed in the first edition of Sanger on Wills and Intestacies.

(*i*) *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants*, [1901] A. C. 426.

(*k*) *Re Amos*, [1891] 3 Ch. 159 : *post*, p. 212.

(*l*) *Post*, p. 249.

(*m*) *Worms* v. *De Valdor*, 49 L. J. Ch. 261; *Re Selot's Trust*, [1902] 1 Ch. 488.

accordingly a will of freehold estate attested by such persons was invalid; and that, too, not only as to the part which created the interest of the attesting witness, but in regard to the whole (*n*).

Will not to be void on account of incompetency of attesting witnesses.

Section 14 of the Wills Act now provides that if any person, who shall attest the execution of a will, shall at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

Gift to an attesting witness or wife or husband of witness to be void.

Section 15 provides that if any person shall attest the execution of any will to whom, or to whose wife or husband, any beneficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment, shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person, or wife or husband, be utterly null and void; and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment, mentioned in such will.

This section does not apply to a will made by a soldier under section 11 of the Act. See Chapter VI. Thus a witness who attests such a will is not disqualified from taking a gift under it (*o*).

Creditor attesting to be admitted a witness.

Section 16 provides that in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

Executor to be admitted a witness.

Section 17 provides that no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

Points decided on Wills Act, s. 15.

Upon the construction of the 15th section, it has been decided that a legatee under a will does not lose his legacy by

(*n*) As to the question whether the competence of the witness could be restored by a subsequent release of his interest, see *Lowe* v. *Jolliffe*, 1 W. Bl. 365; *Goodtitle* v. *Welford*, Dougl. 139; *Doe* v. *Hersey*, 4 Burn's Eccl. Law, 27; *Brograve* v. *Winder*, 2 Ves. Jun. 636.

(*o*) *Re Limond*, [1915] 2 Ch. 240; *Emanuel* v. *Constable*, 3 Russ. 436.

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attesting a codicil which confirms the will (*p*); and further, that a residuary legatee by so doing does not lose his share of the residue, although the codicil in fact increases that share by revoking some particular legacies (*q*). Each witness attests only the instrument to which he puts his name. Consequently, if a will consists of separate sheets of paper, executed by the testator on the same day, but separately attested, a legatee under one of them does not forfeit his legacy by reason of his having attested one or more of the other sheets (*r*). Again, where a will attested by a legatee is re-published by a codicil attested by other witnesses, the gift to the legatee is made good (*s*). And this benefit is not lost to the legatee by his subsequent attestation of a second codicil (*t*). But where by will a legacy was bequeathed in a contingency which failed, and by a codicil attested by the legatee the legacy was made absolute, the legatee was held disqualified to take the absolute legacy (*u*). And, following the rule regarding wills of real estate under the pre-existing law, a witness is held to be disqualified to take as legatee although he is a supernumerary (*x*). But evidence is admissible to show under what circumstances the supernumerary signed, and if it appears that he did not sign as a witness (*e.g.*, if he did not sign at the request of the testator, or contemporaneously with the attesting witnesses) he will not lose his legacy (*y*). According to numerous cases, the rule is, that if a will contains the names of three or more persons who appear to be attesting witnesses, some of them being legatees, all the names must be included in the probate, in order that the question whether the legatees did or did not sign as witnesses may be decided in a Court of equity (*z*). But in *In b. Sharman* (*a*), where the general rule was recognised, the question had to be decided by the Court of Probate, because on it depended the further question to whom the grant was to go. Lord Penzance held on the evidence that the residuary legatee did not sign as an attesting witness, and directed her name to be omitted

Evidence admissible to show that legatee did not sign as witness.

(*p*) *Gurney* v. *Gurney*, 3 Drew. 208; *Tempest* v. *Tempest*, 2 K. & J. 642; 7 D. M. & G. 470; *Re Marcus*, 57 L. T. 399, unless he also attested the will itself (*ib.*).

(*q*) *Gurney* v. *Gurney*, *supra*.

(*r*) *Re Craven*, 99 L. T. 390.

(*s*) *Anderson* v. *Anderson*, L. R. 13 Eq. 381.

(*t*) *Re Trotter*, [1899] 1 Ch. 764.

(*u*) *Gaskin* v. *Rogers*, L. R. 2 Eq. 284.

(*x*) *Wigan* v. *Rowland*, 11 Hare, 157; *Cozens* v. *Crout*, 42 L. J. Ch. 840.

(*y*) *Randfield* v. *Randfield*, 30 L. J. Ch. 179, n., where there were two attestations.

(*z*) *Wigan* v. *Rowland*, 11 Hare, 157; *Cozens* v. *Crout*, 42 L. J. Ch. 840; *In b. Mitchell*, 2 Curt. 916; *In b. Forest*, 31 L. J. P. 200; *In b. Raine*, 34 L. J. P. 125; *In b. Smith*, *ib.* 19.

(*a*) L. R. 1 P. & D. 661.

from the grant. This decision appears to be generally regarded as laying down the rule that it is the function of the Court of Probate to decide the question in all cases (*b*), and that if the name of a person is included in the probate as an attesting witness, that is conclusive on the Court of construction (*c*). But the rule laid down by the earlier cases is, it is submitted, more in accordance with principle.

It has been held that a person who attests the attestation of a marksman is himself an attesting witness to the will, and a legacy to him consequently fails (*d*).

Acceleration of remainders where life interest is given to attesting witness.

It has further been held, upon the construction of this section, that where there is a testamentary gift for life, which fails by reason of the attestation of the will by the donee, or by his or her wife or husband, with remainder to the children of the donee, and in default of children then over, the remainder to the children, if in existence at the testator's death, will not be defeated, but will be accelerated and become an immediate interest (*e*); but that, if there is then no child of the donee for life, the ultimate gift upon the determination of the life interest cannot be accelerated, but during the life of the donee, and until birth of issue, the income of real estate will belong to the testator's heir-at-law (*f*). In the case of personalty the interim income would, on the same principle, go to the testator's next of kin (*f*).

The gift which fails by the operation of the section is not struck out of the will for all purposes; consequently if there is a gift to "A or her children," and A's husband attests the will, the failure of the gift to A does not make the substitutionary gift to her children take effect (*g*).

Marriage of devisee or legatee after attestation to attesting witness.

The validity of a devise or bequest will not be destroyed, under section 15 of the Wills Act, if an attesting witness, who, at the time of the attesting act, takes no benefit under the will, subsequently marries the devisee or legatee (*h*).

Power for solicitor trustee to make professional charges.

A direction by will that a solicitor executor or trustee may make professional charges, creates a benefit under the will within the meaning of this section; and consequently if the solicitor

(*b*) *In b. Murphy*, Ir. R. 8 Eq. 300; *In b. Smith*, 15 P. D. 2.

(*c*) *Re Faux*, [1888] W. N. 249; *Re Lanceley*, [1889] W. N. 31. These were cases of personalty. As to realty, see *Randfield* v. *Randfield*, 30 L. J. Ch. 179, n.

(*d*) *Wigan* v. *Rowland*, 11 Hare, 157. But if it were shown that he attested the signature or mark of the attesting witness at the request of the latter and not of the testator, would not this take the case out of the section, on the principle stated in *Randfield* v. *Randfield*?

(*e*) *Jull* v. *Jacobs*, 3 Ch. D. 703; *Re Clark*, 31 Ch. D. 72.

(*f*) *Re Townsend's Estate*, 34 Ch. D. 357; see also *Kearney* v. *Kearney*, [1911] 1 Ir. R. 137.

(*g*) *Aplin* v. *Stone*, [1904] 1 Ch. 543.

(*h*) *Thorpe* v. *Bestwick*, 6 Q. B. D. 311.

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attests the will he is precluded from claiming the right to make the charges (*i*).

Where attesting witness is trustee.

A gift to an attesting witness as trustee is not invalidated by section 15 (*j*).

In *Re Fleetwood* (*k*), Hall, V.-C., held that where a gift is made by will to a trustee upon a parol trust, a person who attests the will cannot take any benefit under the trust, but the point was not argued, and the decision has not been followed in Ireland (*l*).

Devise to heir; its effect under the old law.

IV.—Devise to Testator's Heir.—Another disability to take by devise formerly arose out of the doctrine that where a title by descent and a title by devise concurred in the same individual, the former predominated, and the heir was in by descent and not by purchase. If, however, the quality of the estate which the heir took by the devise differed from that which would have descended upon him, he acquired the property as devisee (*m*). But the statute of 3 & 4 Will. 4, c. 106, s. 3, provides that, when any land shall have been devised by any testator who shall die after December 31, 1832, to the heir, or the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent (*n*).

Stat. 3 & 4, Will. 4, c. 106, s. 3, making an heir-devisee a purchaser.

New law.

It has been decided that the word "heir" includes "heirs," and that the section operates to alter the quality of the estate taken by the heir, so that if a testator leaves co-heiresses, they take as joint tenants under a devise to them, and not as coparceners (*o*). After 1925 the land not disposed of by a will

(*i*) *Re Barber*, 31 Ch. D. 665; *Re Pooley*, 40 Ch. D. 1; *Re Trotter*, [1899] 1 Ch. 764.

(*j*) *Cresswell* v. *Cresswell*, L. R. 6 Eq. 69.

(*k*) 15 Ch. D. 594.

(*l*) *O'Brien* v. *Condon*, [1905] 1 Ir. R. 51. The point was referred to in *Sullivan* v. *Sullivan*, [1903] 1 Ir. R. 193.

(*m*) See as to the effect of devises to a testator's heir under the former law, *Haynsworth* v. *Pretty*, Cro. Eliz. 833, 919; Moo. 644; *Clerk* v. *Smith*, 1 Salk. 241; *Chaplin* v. *Leroux*, 5 M. & Sel. 14; *Doe* v. *Timins*, 1 B. & Ald. 530; *Manbridge* v. *Plummer*, 2 My. & K. 93. As to copyholds, *Smith* v. *Triggs*, 1 Str. 487. That in cases of marshalling, the heir, under an express devise to him, had the rights of a devisee, see *Biederman* v. *Seymour*, 3 Bea. 368; *a fortiori*, since the stat. 3 & 4 Will. 4, c. 106, s. 3; see *Strickland* v. *Strickland*, 10 Sim. 374. As to devises to co-heiresses of an estate in joint tenancy or in common, see *Anon.*, Cro. Eliz. 431; *Swaine* v. *Burton*, 15 Ves. 365. As to the effect of a devise to several co-heirs or co-heiresses, or one of them, see *Bear's Case*, 1 Leon. 112, 315; Co. Litt. 163b; *Reading* v. *Royston*, 1 Salk. 242. And as to the devise of a contingent remainder to the testator's heir at law, see 1 Sanders, Uses, 133, n. (4th ed.), citing *Cholmondeley* v. *Clinton*, 2 J. & W. 1.

(*n*) The negative words seem to exclude the claim of a devisee-heir of copyholds (which are expressly included in the Act) to disclaim the devise and take as heir: *Bickley* v. *Bickley*, L. R. 4 Eq. 216.

(*o*) *Re Baker*, 79 L. T. 343; *Owen* v. *Gibbons*, [1902] 1 Ch. 636.

does not descend to the testator's heir (section 45 of the Administration of Estates Act, 1925), but a devise may be made to the heir as *persona designata*, in which case the heir is ascertained by the law in force before 1926 (section 132 of the Law of Property Act, 1925; *post*, p. 1525).

Infants.

V.—Infants.—Infants (including infants *en ventre sa mère* (*p*)) are not incapacitated from taking by devise or bequest, though they cannot manifest their acceptance; for acceptance will be presumed unless it would work injury to the devisee or legatee. But they cannot give effectual releases, or exercise a right of election (see Chapter XVI), and, where a legacy is given to an infant, the executor cannot pay it to the infant, but he could pay it into Court under section 32 of the Legacy Duty Act, 1796, now replaced by section 63 of the Trustee Act, 1925. Under section 42 of the Law of Property Act, 1925, the personal representatives can appoint trustees to receive the legacy or a share of residue or property devised absolutely to an infant. An infant cannot hold a legal estate in land (*q*).

A testator may, of course, expressly authorise payment of a legacy to an infant (*r*), or to a parent, guardian, or other person on his behalf, and the legacy may properly be paid accordingly.

A legacy may be paid to a foreign infant who has attained majority according to the law of the infant's domicil (*s*).

Abolition of forfeiture for treason and felony.

VI.—Traitors and Felons.—By the Forfeiture Act, 1870, where any person has been sentenced to death or penal servitude upon any charge of treason or felony, the Crown may appoint an administrator of his property, and all real and personal property to which the convict becomes entitled between the date of his conviction and the completion of his sentence, or his pardon, vests in the administrator for the purposes of the Act. Before this Act, all property, both real and personal, accruing to a felon or traitor during the term above referred to, was forfeited to the Crown by virtue of its prerogative (*t*). After completion of the sentence or pardon, his right to acquire and hold property was restored to him (*u*).

(*p*) *Burdet* v. *Hopegood*, 1 P. W. 486; *Mogg* v. *Mogg*, 1 Mer. 654.

(*q*) Law of Property Act, 1925, s. 1, sub-s. 6.

(*r*) *Re Denekin*, 72 L. T. 220. As to this case see *post*, p. 1079.

(*s*) *Re Hellmann's Will*, L. R. 2 Eq. 363; *Donahoe* v. *Donahoe*, 19 L. R. Ir. 349; *Re Schnapper*, [1928] 1 Ch. 420.

(*t*) Co. Litt. 2b. "An attainted person is considered in law as one *civiliter mortuus*. He may acquire, but he cannot retain." *Bullock* v. *Dodds*, 2 Barn. & Ald. 258; *Roberts* v. *Walker*, 1 R. & Myl. 752.

(*u*) *Stokes* v. *Holden*, 1 Keen, 145; *Barnett* v. *Blake*, 2 Dr. & S. 117; *Gough* v. *Davies*, 2 K. & J. 623; *Re Thompson's Trusts*, 22 Bea. 506; *Re Harrington's Trust*, 29 Bea. 24, and cases there cited.

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A person who feloniously kills another cannot take a benefit under that person's will (*x*), but a person convicted of murder and found to be insane when he committed the act is not prevented from taking a share under the murdered man's intestacy (*y*).

The Public Trustee.

VII.—The Public Trustee.—By section 2, sub-section 5, of the Public Trustee Act, 1906, the Public Trustee is precluded from accepting a trust exclusively for charitable purposes, so that if property is left to him on charitable trusts he cannot accept (*z*); nor can he accept the trusteeship of any settlement other than an English one (*a*).

VIII.—Unascertained Persons.—A gift to a person who is not ascertained at the date of the will is not invalid for that reason, unless the result would be to enable the testator to make a testamentary disposition by a subsequent unattested instrument, or by an act which is testamentary in its nature (*b*).

Animals.

IX.—Animals.—It may be added that an animal cannot take by devise or bequest, as appears clearly from the doctrine of our law with regard to monsters (*c*). It is equally clear, on principle, that an animal cannot be a *cestui que vie* for the purpose of creating an estate *pur auter vie*, or a "life" within the meaning of the Rule against Perpetuities (*d*). The question whether a trust can be created for the benefit of an animal is discussed in Chapter XXIV. A trust for the benefit of animals may be good as a charity (*e*).

(*x*) *Re Hall*, [1914] P. 1 (manslaughter). See *In b. Crippen*, [1911] P. 108 (murder).

(*y*) *Re Houghton*, [1915] 2 Ch. 173.

(*z*) *Re Hampton*, 88 L. J. Ch. 103. See *Re Cherry's Trusts*, [1914] 1 Ch. 83. As to a devise to a parish priest in Ireland made void by section 16 of the Charitable Donations and Bequests Act, see *Corcoran* v. *O'Kane*, [1913] 1 Ir. R. 1.

(*a*) *Re Hewitt's Settlement*, [1915] 1 Ch. 228.

(*b*) See *Stubbs* v. *Sargon*, 2 Keen, 255; 3 Myl. & Cr. 507; *post*, p. 122.

(*c*) See *post*, p. 1629.

(*d*) As to the decision in *Re Dean*, 41 Ch. 552, see *post*, p. 268.

(*e*) See *post*, p. 202.

CHAPTER VI.

EXECUTION AND ATTESTATION OF WILLS.

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Effect of *lex domicilii* and *lex rei sitæ*.

THE remarks in this chapter as to the formalities required for a valid will, apply only to wills intended to operate according to the law of England. If the will of an English testator is intended to dispose of land situate out of England, it must be borne in mind that testamentary dispositions of immoveable property are governed by the *lex rei sitæ* (*a*), and accordingly care must be taken to ascertain and comply with the formalities required for the validity of wills by the law of the country where the property is situate. Sometimes, also, a doubt may arise whether an Englishman, who has been long resident abroad, has, at the time of making his will, an English or a foreign domicil; in such a case it will be prudent that the will should be in such form and so attested and executed as to be valid not only according to English law, but also according to the law of the foreign country by which it is apprehended that the disposition of his moveable property may possibly be regulated (*b*).

If the will of a person domiciled in a foreign country has been proved there, it will generally be accepted as valid by the Court of Probate here (*c*).

(*a*) *Ante*, p. 1.
(*b*) *Ante*, p. 18.
(*c*) *Ante*, p. 8.

CHAPTER VI.

Wills made by soldiers, sailors, and airmen.

I.—Privileged Wills.—The only kind of privileged will now recognised by law (*d*) is a will made by a soldier, sailor, or airman in certain circumstances. Section 11 of the Wills Act enacts that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of the Act. A similar saving was contained in the Statute of Frauds (section 23).

The Wills (Soldiers and Sailors) Act, 1918.

The privilege granted by the Wills Act was considerably extended by the Wills (Soldiers and Sailors) Act, 1918, which received the Royal Assent on February 6, 1918. The Act is in the following terms :—

Explanation of section 11 of 7 Will. 4 and 1 Vict. c. 26.

1. In order to remove doubts as to the construction of the Wills Act, 1837, it is hereby declared and enacted that section 11 of that Act authorises and always has authorised any soldier being in actual military service, or any mariner or seaman being at sea, to dispose of his personal estate as he might have done before the passing of that Act, though under the age of twenty-one years.

Extension of section 11 of Wills Act, 1837.

2. Section 11 of the Wills Act, 1837, shall extend to any member of His Majesty's naval or marine forces not only when he is at sea but also when he is so circumstanced that if he were a soldier he would be in actual military service within the meaning of that section.

Validity of testamentary dispositions of real property made by soldiers and sailors.

3.—(1) A testamentary disposition of any real estate in England or Ireland made by a person to whom section 11 of the Wills Act, 1837, applies, and who dies after the passing of this Act, shall, notwithstanding that the person making the disposition was at the time of making it under twenty-one years of age or that the disposition has not been made in such manner or form as was at the passing of this Act required by law, be valid in any case where the person making the disposition was of such age and the disposition has been made in such manner and form that if the disposition had been a disposition of personal estate made by such a person domiciled in England or Ireland it would have been valid.

(2) A testamentary disposition of any heritable property in Scotland made after the passing of this Act by a person to whom section 11 of the Wills Act, 1837, applies or to whom it would apply if he were domiciled in England, shall not be invalid by reason only of the fact that such person is under twenty-one years of age, provided always that he is of such age

(*d*) As to the old law on this subject, see Swinburne on Testaments, Part I, s. 13.

that he could, if domiciled in Scotland, have made a valid testamentary disposition of moveable property.

Power to appoint testamentary guardians.

4. Where any person dies after the passing of this Act having made a will which is, or which, if it had been a disposition of property, would have been rendered valid by section 11 of the Wills Act, 1837, any appointment contained in that will of any person as guardian of the infant children of the testator shall be of full force and effect.

Short title and interpretation

5.—(1) This Act may be cited as the Wills (Soldiers and Sailors) Act, 1918.

(2) For the purposes of section 11 of the Wills Act, 1837, and this Act the expression "soldier" includes a member of the Air Force, and references in this Act to the said section 11 include a reference to that section as explained and extended by this Act.

It will be seen that the Act of 1918 makes extensive additions to the privileges granted to soldiers and sailors by the Wills Act, and renders inapplicable many cases decided under the Wills Act. It removed a doubt raised by Younger, J., in *Re Wernher* (*e*), a case in which it was held that an infant on active service could exercise a general power of appointment. It gets rid in the future of such cases as *Godman* v. *Godman* (*f*), where it was held that a letter dealing with real as well as personal estate could not be admitted to probate because the gifts of the personal estate were not independent of those of the realty; and *Nixon* v. *Prince* (*g*), where the words "I leave all that I have to A" operated to revoke an earlier will as to personalty but not as to realty.

Navy and Marines (Wills) Acts, 1865 and 1897.

By the Navy and Marines (Wills) Acts, 1865 and 1897, a will made by any seaman (*h*) or marine (*i*) or other person (*k*), belonging to His Majesty's naval or marine force, is not valid to pass any wages or other money payable by the Admiralty, or any effects or money in charge of the Admiralty, unless it is written and executed with the formalities required for ordinary wills, with the additional requirement that one of the attesting witnesses must (if the will is made on board one of His Majesty's ships) be a commissioned officer, chaplain or warrant or subordinate officer belonging to His Majesty's naval or marine or military force, or (if the will is made elsewhere) be an officer or

(*e*) [1918] 1 Ch. 339; [1918] 2 Ch. 82.
(*f*) [1919] P. 229; [1920] P. 261.
(*g*) 34 T. L. R. 444.
(*h*) Including petty officer.
(*i*) Including non-commissioned officer.
(*k*) Other than commissioned, warrant and subordinate officers, assistant engineers and kroomen.

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chaplain of the rank above mentioned, or the governor, agent, physician, surgeon, assistant surgeon or chaplain of a naval hospital, or a justice of the peace, or the incumbent, curate or minister of a church or place of worship in the parish where the will is executed, or a British consular officer, or an officer of customs, or a notary public, or a solicitor or, in Scotland, a law agent. Special provisions are made as to the execution of wills of seamen or marines while prisoners of war. Notwithstanding the foregoing provisions, if the will of a marine in actual military service, or a mariner or seaman at sea, is not made in conformity with them, the Admiralty may pay or deliver his wages, moneys or effects to any person claiming to be entitled thereto under such will, if, having regard to the special circumstances of the death of the testator, the Admiralty are of opinion that compliance with the requirements of the Act may be dispensed with.

By the Navy and Marines (Wills) Act, 1914, the Admiralty were enabled to dispense with the requirements of the Navy and Marines (Wills) Acts, 1865 and 1897, in the case of seamen and marines dying during or in consequence of the great war.

Merchant Shipping Act, 1894.

The Merchant Shipping Act, 1894, provides that where a deceased seaman (*l*) or apprentice has left a will, the Board of Trade may refuse to pay or deliver any property of his which has come into the hands of the Board to any person claiming under the will, unless (if made on board ship) it is in writing and signed or acknowledged by the testator in the presence of and attested by the master or first or only mate of the ship; if the will was not made on board ship, the Board may refuse to pay or deliver the property to any person claiming under the will, and not related to the testator by blood or marriage, unless the will is in writing and signed or acknowledged by the testator in the presence of and attested by two witnesses, one of whom is a mercantile marine superintendent, or a minister of religion officiating in the place where the will is made, or where there are no such persons, a justice, British consular officer, or an officer of customs.

Age of testator.

Any soldier or sailor coming within the exception contained in section 11 of the Wills Act, if over the age of fourteen years, may dispose of his goods and chattels, either by a written or by a nuncupative will (*m*). A written will is one which is written by the testator or committed to writing by his direction. It

Written will.

(*l*) Including every person (except masters, pilots, and apprentices) employed or engaged in any capacity on board a ship.

(*m*) Swinburne, 114; Co. Litt. 111a, 114; *In b. Farquhar*, 4 No. of C. 651; *In b. M'Murdo*, L. R. 1 P. & D. 540.

may be of the most informal character (*n*), and it does not require to be signed or even seen by him (*o*), but strict proof is required of the history of every alleged will, even if written and signed by the testator (*p*). A nuncupative will "is when the testator without any writing doth declare his will before a sufficient number of witnesses" (*q*).

Nuncupative will.

A nuncupative will, in the proper sense of the term, requires to be proved by very clear and satisfactory evidence. In most, if not all, of the cases in which a nuncupative will has been admitted to probate, the testator was *in extremis* at the time of making it (*r*). But the term "nuncupative will" is often applied to an informal written will made by a soldier on active service.

Evidence required to prove nuncupative will.

It is not necessary for the validity of a soldier's nuncupative will to prove that he knew he was making a will or to prove that he had the power to make a will while a minor or by word of mouth (*s*).

A letter to be admissible as a soldier's will must be testamentary in character and intention (*t*); thus a letter containing statements, partly erroneous, of what the soldier thought he had done by his will cannot be admitted to probate (*u*).

The Court will admit to probate only the testamentary parts of a letter, if the military authorities object to the rest being published (*x*).

It may be mentioned that the rule of Roman law that a will made in the manner allowed for a soldier's will is only good for a year after the soldier's discharge does not apply to English law (*y*); and a return to civil life does not, in the absence of intention, operate to revoke a soldier's will (*z*).

An informal testamentary document may be proved as a

Provisional will.

(*n*) *Gattward* v. *Knee*, [1902] P. 99; *May* v. *May*, *ib.* 103, n.; *In b. Scott*, *infra*; *In b. Gordon*, 21 T. L. R. 653; *Re Pawle's Estate*, 34 T. L. R. 437.

(*o*) See *Allen* v. *Manning*, 2 Add. 490; *In b. Taylor*, 1 Hagg. 641; *In b. Scott*, [1903] P. 243.

(*p*) *Machin* v. *Grindon*, 2 Lee, 406; *Crisp* v. *Walpole*, 2 Hagg. 531; *Rutherford* v. *Maule*, 4 Hagg. 213; *Bussell* v. *Marriott*, 1 Curt. 9.

(*q*) Swinburne, 87.

(*r*) See *Morrell* v. *Morrell*, 1 Hagg. 51; *In b. Scott*, *supra*; *Lemann* v. *Bonsall*, 1 Add. 389. Blackstone's definition of a nuncupative will supports this doctrine (Comm. ii, 500).

(*s*) *In b. Stable*, [1919] P. 7; but there must be a testamentary intention: *In b. Donner*, 62 Sol. J. 161.

(*t*) *Selwood* v. *Selwood*, 125 L. T. 26; *Broughton-Knight* v. *Wilson*, 32 T. L. R. 146 (alternative drafts).

(*u*) *In b. Beach*, [1923] P. 46; but the testamentary dispositions may be contained in an ordinary will and subsequent letters: *Re Vernon*, 33 T. L. R. 11.

(*x*) *In b. Heywood*, [1916] P. 47.

(*y*) *Re Booth*, [1926] P. 118; see *In b. Leese*, 17 Jur. 216.

(*z*) *In b. Coleman*, [1920] 2 Ir. R. 332, where a postcard and a letter together constituted the will.

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soldier's will, although it contains an expression of intention to make a formal will at some future time (*a*).

Alterations.

Alterations in a soldier's will are presumed to have been made during military service (*b*).

Who is a "mariner or seaman."

It has been held that a purser or surgeon in the navy comes within the description "mariner or seaman"; and it would seem that the term "mariner or seaman" includes every person in His Majesty's navy, as well the admiral or commander-in-chief as a common seaman (*c*). The expression "mariner or seaman" includes merchant seamen (*d*); and the term is not confined to the male sex (*e*).

"At sea."

A naval surgeon returning home from service invalided on a passenger steamer, is considered to be "at sea" within the meaning of the statute, but it does not follow that a seaman by profession, who is at sea on some occasion wholly dissociated from his profession, is entitled to the benefit of the statute (*f*). A ship in harbour or in a river has been held to be at sea within the meaning of the statute (*g*), and it is even said that if a sailor has joined a vessel and commenced a voyage in it, a will made in the course of that voyage is within the statute, although it was in fact made on shore (*h*).

Section 11 of the Wills Act, 1837, required the mariner or seaman to be at sea (*i*). But section 2 of the Wills (Soldiers and Sailors) Act, 1918 (*k*), altered the qualifications required by the Wills Act, so that a sailor who has received orders to join his ship can make a privileged will if he dies after the date of the Act of 1918 (*l*), but some words on an egg-shell found after the death of a pilot on the Manchester Ship Canal were not admitted to probate, because, amongst other reasons, they were not proved to have been written when the testator's position corresponded to that of a soldier *in expeditione* (*m*).

(*a*) *Gattward* v. *Knee*, [1902] P. 99.

(*b*) *In b. Tweedale*, L. R. 3 P. & D. 204.

(*c*) *In b. Hayes*, 2 Curt. 338; *In b. Saunders*, L. R. 1 P. & D. 16; *Earl of Euston* v. *Lord Henry Seymour*, cit. 2 Curt. 339; *In b. Rae*, 27 L. R. Ir. 116.

(*d*) *Morrell* v. *Morrell*, 1 Hagg. 51.

(*e*) *In b. Hale*, [1915] 2 Ir. R. 362 (female typist employed on a liner).

(*f*) *In b. Saunders*, *supra*.

(*g*) *In b. M'Murdo*, L. R. 1 P. & D. 540, and cases there cited; *In b. Patterson*, 79 L. T. 123.

(*h*) *In b. M'Murdo*, *supra*.

(*i*) *Re Thomas's Estate*, 62 Sol. J. 784; *In b. Anderson*, [1916] P. 49; *Barnard* v. *Birch*, [1919] 2 Ir. R. 404.

(*k*) Set out above, p. 88.

(*l*) *In b. Yates*, [1919] P. 93.

(*m*) *Hodson* v. *Barnes*, 43 T. L. R. 71.

The term "soldier" includes officers (*n*), surgeons (*o*), and nurses (*p*).

Soldier.

The words "*on actual military service*" are equivalent to "on an expedition." The service may continue after the fighting is over, but the man on such service must be either on the field of operations, or proceeding to or from the field, or in some place for the purpose of proceeding there (*q*). But a liberal interpretation is given as to the point of time when a soldier begins (*r*) to be, or ceases (*s*) to be on an expedition. Thus actual military service begins on receipt of orders to proceed abroad in order to serve in a campaign (*t*). But the words do not apply to a soldier quartered in barracks when there is no war (*u*); or to an officer on a tour of inspection of troops in his district (*x*).

Actual military service.

A guardian of a child could not be appointed by a soldier's will (*y*), but section 4 of the Wills (Soldiers and Sailors) Act, 1918 (*z*), now allows this to be done.

Guardian.

In *Re Gossage* (*a*), it was held that section 20 of the Wills Act, which prescribes the formalities necessary for the revocation of Wills, did not apply to a soldier's will. But a soldier's will is revoked by marriage (*b*).

Revocation.

II.—Ordinary Wills.—The Wills Act, s. 9, provides, "That no will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; (that is to say) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

Wills Act, s. 9.

It may here be mentioned that if a will appears on the face of it to have been executed and attested in accordance with the

Presumption of due execution.

(*n*) *Drummond* v. *Parish*, 3 Curt. 522.
(*o*) *In b. Donaldson*, 2 Curt. 386.
(*p*) *In b. Stanley*, [1916] P. 192.
(*q*) *In b. Grey*, [1922] P. 140; *Drummond* v. *Parish*, 3 Curt. 522.
(*r*) *In b. Hiscock*, [1901] P. 78; *Herbert* v. *Herbert*, D. & Sw. 10; *In b. Thorne*, 11 Jur. 569; *Re Kitchen*, 35 T. L. R. 612; *Stopford* v. *Stopford*, 19 T. L. R. 185.
(*s*) *Re Limond*, [1915] 2 Ch. 240.
(*t*) *Re Booth*, [1926] P. 118; *Gattward* v. *Knee*, [1902] P. 99; *May* v. *May*, *ib.* 103, n.
(*u*) *Drummond* v. *Parish*, 3 Curt. 522.
(*x*) *In b. Hill*, 1 Rob. 276.
(*y*) *In b. Tollemache*, [1917] P. 246.
(*z*) *Ante*, p. 89.
(*a*) [1921] P. 194.
(*b*) *In b. Wardrop*, [1917] P. 54.

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requirements of the Act, the maxim "*omnia præsumuntur rite esse acta*" applies, unless it is clearly proved by the attesting witnesses that the will was not in fact duly executed (*c*). But if the evidence is clear probate will be refused (*d*). Even where the document is informal (as where there is no attestation clause or the clause is incomplete) it may be assumed to have been duly executed (especially if it is a holograph will), although no evidence of its due execution is forthcoming (*e*). The question is further discussed in connection with the attestation clause (*f*).

Lost will.

Where a will has never been proved and has disappeared since the death of the testator, the maxim "*omnia præsumuntur*" may be applied (*g*).

Writing includes printing, etc.

III.—Will must be in Writing.—The first condition requisite under the Wills Act to render valid any testamentary disposition, is that such disposition shall be "in writing." No particular form is required (*h*). A printed or lithographed form of a will, with or without blanks for names of legatees, amounts of legacies, etc., to be filled up in ink, satisfies this requirement of the Act (*i*). Such instruments are constantly admitted to probate without question (*k*). But where a will is written on a printed form, probate may be granted of the written portion only, if it appears that the testator did not intend the printed portion to form part of his will (*l*). And even where the whole is admitted to probate, the fact that a printed or lithographed form has been used may affect the construction of the will (*m*). A will is not invalid by reason of blank spaces being left in it (*n*), or a blank page (*o*).

Blanks.

(*c*) *Lloyd* v. *Roberts*, 12 Moo. P. C. 158; *Wright* v. *Sanderson*, 9 P. D. 149; *Wyatt* v. *Berry*, [1893] P. 5; *Woodhouse* v. *Balfour*, 13 P. D. 2; *Dayman* v. *Dayman*, 71 L. T. 699; *Byles* v. *Cox*, 74 L. T. 222; *Pilkington* v. *Gray*, [1899] A. C. 401; *In b. Moore*, [1901] P. 44; *Whiting* v. *Turner*, 89 L. T. 71; *Clery* v. *Barry*, 21 L. R. Ir. 152 (signature not by testator); *Re Lavinia Musgrove*, [1927] P. 265 (where the will was not brought to light for twenty years after the death of the testatrix).

(*d*) *Glover* v. *Smith*, 57 L. T. 60.

(*e*) *In b. Peverett*, [1902] P. 205; *Vinnicombe* v. *Butler*, 13 W. R. 392; *In b. Nicks*, 34 L. J. P. 30; *In b. Rees*, *ib.* 56; *Clarke* v. *Clarke*, 5 L. R. Ir. 47; *In b. Malins*, 19 L. R. Ir. 231. See *Gregory* v. *Her Majesty's Proctor*, 4 N. of C. 620; *Marsh* v. *Marsh*, 30 L. J. P. 77, and other cases cited *post*, p. 97.

(*f*) *Post*, p. 110.

(*g*) *Harris* v. *Knight*, 15 P. D. 170.

(*h*) *Oldroyd* v. *Harvey*, [1907] P. 326, stated *post*, p. 146.

(*i*) See the Interpretation Act, 1889, s. 20.

(*k*) See *In b. Adams*, L. R. 2 P. & D. 367.

(*l*) *In b. Moore*, [1892] P. 378.

(*m*) See *Re Spencer*, 54 L. T. 597, stated *post*, p. 550.

(*n*) *Corneby* v. *Gibbons*, 1 Rob. 705; *In b. Kirby*, 1 Rob. 709. As to the construction of a will with blanks, see cases referred to *post*, pp. 432, 447, 490, 491, 499; also *Re Harrison*, 30 Ch. D. 390; *Re Macduff*, [1896] 2 Ch. 451; *In b. Hubbuck*, [1905] P. 129.

(*o*) *In b. Wotton*, L. R. 3 P. & D. 159; *In b. Fuller*, [1892] P. 377; *In b. Rice*, Ir. R. 5 Eq. 176.

Any difficulty which may arise by reason of the blanks, or any similar error, must be determined by the Court of construction.

And if blanks in a will (which is written in ink) are filled up in pencil before execution, the matter so inserted will be included in the probate (*p*).

Will written in pencil.

A will may be written in pencil (*q*). But where a printed form was filled up partly in ink and partly in pencil, and the writing in ink made sense with the form without help from the writing in pencil, part of which was written over by the ink, the ink writing alone was held to be the will (*r*). As to the effect of pencil alterations in a will written in ink, see below, pp. 145, 146.

Parol trust.

The statutory requirement that a will must be in writing has been disregarded by the Courts, in cases where it has been proved that a person to whom property has been given by will, holds it upon a parol trust (*s*).

Will affected *ex post facto*.

There are also cases in which documents written by a testator after the execution of his will are allowed to affect its operation. Thus in *Re Davy* (*t*), it seems to have been assumed by all parties that a testator could, by making entries in his ledger, determine whether advances made by him to his children should be taken in part satisfaction of the bequests made to those children by his will. So in *Townsend* v. *Townsend* (*u*), memoranda made by a testatrix after the execution of her will were held admissible to show (in effect) that by a gift of stock in the A Company, she meant to bequeath stock in the B Company.

Will must be signed.

IV.—Signature by Testator.—The next condition prescribed for the validity of a will is that it should be signed, which suggests the inquiry what amounts to a "signing" by the testator (*x*). It has been decided that a mark is sufficient (*y*),

Mark, a sufficient signing.

(*p*) *Kell* v. *Charmer*, 23 Bea. 195.

(*q*) The general rule is that what is written in pencil is *prima facie* deliberative, and under the old law, which allowed very informal wills of personalty, the question often arose whether testamentary depositions in pencil were to be treated as final. As in the case of *Bateman* v. *Pennington*, 3 Moo. P. C. C. 223, where the will was written in ink and signed by the testator in pencil, but unattested. Such a case could not happen at the present day. See the cases on alterations in pencil cited *post*, p. 145.

(*r*) *In b. Adams*, L. R. 2 P. & D. 367. *In b. Bellamy*, 14 W. R. 501, was a similar case, but it is too shortly reported to be of much value.

(*s*) See Chap. XXIV, where the case of *In b. Marchant*, [1893] P. 254, is referred to *post*, p. 885.

(*t*) [1907] W. N. 210.

(*u*) 1 L. R. Ir. 180. *Post*, p. 1273.

(*x*) Of course, a testator can sign in pencil, as his signature or acknowledgment in the presence of witnesses would exclude all question as to the act being merely deliberative.

Dry pen.

(*y*) The "mark" must leave a trace; it is not sufficient to point to or touch the paper with a dry pen: see *Kevil* v. *Lynch*, Ir. R. 8 Eq. 244; 9 *ib.* 249, where it was held (as a matter of fact) that a somewhat dubious kind of mark had been made.

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Initials.

Wrong name.

Wrong will.

Sealing, insufficient.

Signature by another for testator.

even if the testator is able to write (*z*), and though his name does not appear on the face of the will (*a*). A mark being sufficient, of course the initials of the testator's name would also suffice (*b*). And it would be immaterial that he signed by a wrong or assumed name (since that name would be taken as a mark (*c*)), or that against the mark was written a wrong name (*d*), and that the testator was also wrongly named in the body of the will (*e*), or that his hand was guided in making the mark (*f*). But where an intending testator executes the wrong will by mistake, it has no testamentary effect (*g*).

Sealing alone will not as a general rule satisfy the statutory requirement that a will must be signed by the testator (*h*). But it is conceived that a distinctive seal, if shown to have been impressed by the testator with the design of authenticating the instrument, would be good as a signature by mark. And, accordingly, in an Irish case (*i*), a seal with the testator's initials engraved thereon, impressed *animo testandi*, was held to be a sufficient signature.

Both statutes expressly permit the testator's signature to be made by some other person by his direction, provided that it is made in his presence (*k*). That other person may, it seems, be one of the witnesses (*l*), and it is immaterial that he signed his own name instead of the name of the testator (*m*). And where the testator directed a person to sign the will for him, which that person did by writing at the foot, "this will was read and approved by C. F. B., by C. C. in the presence of &c.," and then followed the signatures of the witnesses, the will was held good (*n*). And on the ground that whatever would be good as a signature, if made by the testator, must be equally good if

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(*z*) *Taylor* v. *Dening*, 3 Nev. & P. 228; *S. C. nom. Baker* v. *Dening*, 8 Ad. & Ell. 94; *Donelly* v. *Broughton*, [1891] A. C. 435.

(*a*) *In b. Bryce*, 2 Curt. 325.

(*b*) *In b. Savory*, 15 Jur. 1042.

(*c*) *In b. Redding*, 2 Rob. 339; *In b. Glover*, 11 Jur. 1022; and see the corresponding cases as to signature of a witness, *post*, p. 104.

(*d*) *In b. Clarke*, 27 L. J. P. 18.

(*e*) *In b. Douce*, 8 Jur. (N.S.) 723, also reported (S.N.) *In b. Douse*, 31 L. J. P. 172; *ante*, p. 33.

(*f*) *Wilson* v. *Beddard*, 12 Sim. 28.

(*g*) See *ante*, p. 32.

(*h*) *Smith* v. *Evans*, 1 Wils. 313; *Ellis* v. *Smith*, 1 Ves. Jun. 11; *Grayson* v. *Atkinson*, 2 Ves. 459; *Wright* v. *Wakeford*, 17 Ves. 456.

(*i*) *In b. Emerson*, 9 L. R. Ir. 443.

(*k*) *Kevil* v. *Lynch*, Ir. R. 8 Eq. 244.

(*l*) *In b. Bailey*, 1 Curt. 914; *Smith* v. *Harris*, 1 Rob. 262.

(*m*) *In b. Clark*, 2 Curt. 329.

(*n*) *In b. Blair*, 6 N. of C. 528. But in *Burke* v. *Moore*, Ir. R. 9 Eq. 609, where the name of the testator was subscribed by B. by his direction, and the signature (but not the direction) was made in the presence of and attested by two witnesses, it was held that the will was not duly executed, partly, it seems, because the signature had not been acknowledged by the testator: *sed quære*. As to this case see *post*, p. 103, n. (*o*).

made by his direction, an impression of his name stamped by his direction was held good, as a mark would also have been (*o*).

One signature of several sheets sufficient.

One signature, of course, is sufficient, though the will be contained in several sheets of paper (*p*); and it will generally be presumed that all the sheets were put together in the same order at the time of execution as at the testator's death (*q*); and that any apparent alteration in their order and paging was made before execution (*r*). This presumption may, of course, be rebutted (*s*). And in *In b. Madden* (*t*), where the sheets were found pinned together, and the testatrix's signature and the attestation clause were on the first sheet, the Court came to the conclusion that the sheets had been inadvertently misplaced.

Sheets not fastened together.

It is not even necessary that the sheets of the will should be physically connected, or fastened or held together; if the evidence satisfies the Court that when the last sheet was signed and attested the other sheets were in the room, and that the testator treated them as together constituting his will, that is sufficient. In coming to this conclusion the Court may, if the evidence is conflicting or defective, draw inferences from the provisions of the will and other circumstances (*u*).

Signature and attestation on separate sheet.

But it seems that this rule does not apply unless a dispositive part of the will is contained on the sheet which bears the signature and attestation. The signature may indeed be on a separate piece of paper containing nothing but the signature and attestation, but in that case the piece of paper must be in some way "attached" to the will itself, and the fact of its having been so attached before execution must be proved (*x*). What degree of "attachment" is required does not seem to be satisfactorily settled. In *In b. Braddock* (*y*), Hannen, Pres., seemed to think that the papers must be "physically connected," as with a piece of tape, or a pin (*z*): clearly paste or a wafer would be sufficient (*a*). But in *Lewis* v. *Lewis* (*b*), where the two sheets

(*o*) *Jenkins* v. *Gaisford*, 3 Sw. & Tr. 93.

(*p*) *Lewis* v. *Lewis*, [1908] P. 1.

(*q*) *Marsh* v. *Marsh*, 30 L. J. P. 77. And see *Bond* v. *Seawell*, 3 Burr. 1775.

(*r*) *Rees* v. *Rees*, L. R. 3 P. & D. 84. As to the presumption regarding other alterations, see *post*, p. 143.

(*s*) See *Treolar* v. *Lean*, 14 P. D. 49, and *Leonard* v. *Leonard*, [1902] P. 243, *post*, p. 134.

(*t*) [1905] 2 Ir. R. 612.

(*u*) *Gregory* v. *Her Majesty's Proctor*, 4 N. of C. 620. In that case the Court was assisted by the fact that the will was holograph. See *In b. M'Key*, Ir. R. 11 Eq. 220, where the evidence was insufficient.

(*x*) *Cook* v. *Lambert*, 32 L. J. P. 93; *In b. Horsford*, L. R. 3 P. & D. 211; *In b. West*, 32 L. J. P. 182.

(*y*) 1 P. D. 433, stated *post*, p. 106; see *In b. Horsford*, L. R. 3 P. & D. 211.

(*z*) As in *In b. Madden*, [1905] 2 Ir. R. 612.

(*a*) *In b. Gausden*, 31 L. J. P. 53; *Cooke* v. *Lambert*, 32 L. J. P. 93.

(*b*) [1908] P. 1; *post*, p. 99, n. (*m*).

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of paper alleged to contain the will (the signatures of the witnesses being on the first sheet, and the testator's signature on the second), were merely held together by the testator's finger and thumb, it was held by Bargrave Deane, J., that this was a sufficient attachment (*c*).

Extrinsic evidence.

In considering whether or not several pieces of paper constitute the will, declarations made by the testator both before and after execution are admissible to show that it was his intention to make dispositions in conformity with those which are found upon the several sheets of paper (*d*).

Further signature contemplated.

In a case where the testimonium at the end referred to the preceding sides of the sheet of letter paper as being subscribed by the testator, the fact of those sides not being so signed was held not to affect the validity of the will, as the testator evidently intended the signing and sealing of the last side to apply to the whole (*e*). But the signature must have been made with the design of authenticating the instrument; for it should seem that if the testator contemplated a further signature which he never made, the will must be considered as unsigned (*f*).

Conversely, if a testator has duly executed his will and afterwards signs his name to it again, in the presence of two persons who also sign their names, it may appear from the circumstances that this was not intended as a re-execution of the will, but was done for some other purpose (*g*).

Having regard to the necessity (referred to in the next section of this Chapter) that the signature should not be above or precede the dispositive part of the will, it seems advisable, when a testator is *in extremis*, that the first or only signature should be at the end; for it has sometimes happened that a testator who has begun to sign the several sheets has expired or become insensible before he had reached the last.

Provision requiring the signature to be at the foot or end—

V.—Position of Testator's Signature.—The statute 1 Vict. c. 26, as amended, introduced a condition in this respect not formerly essential to the validity of a will, namely, that the signature of the testator must be somewhere near the end of the instrument, and so as not to be immediately over, or preceding any of the dispositive parts of the instrument, but it need not immediately follow or be under any of the dispositive parts; whereas formerly the signature might be in any part of the

(*c*) In *Re Nicholls*, [1921] 2 Ch. 11, the signatures of the testator and the witnesses were on the cover of a secret will under Chilean law.

(*d*) *Gould* v. *Lakes*, 6 P. D. 1.

(*e*) *Winsor* v. *Pratt*, 5 J. B. Moo. 484.

(*f*) See *Griffin* v. *Griffin*, 4 Ves. 197, n.; *Coles* v. *Trecothick*, 9 Ves. 249; *Walker* v. *Walker*, 1 Mer. 503; *Sweetland* v. *Sweetland*, 34 L. J. P. 42.

(*g*) *Dunn* v. *Dunn*, L. R. 1 P. & D. 277.

instrument. The provision in the original enactment requiring the signature of the testator to be at the "foot or end" of the will (which was evidently intended only to do away with the former rule that the name of the testator written in the commencement thus :—"I, A. B., do make, &c.," was a sufficient signature), seems at first to have answered the purpose intended; subsequently however, the Courts came to the conclusion that the words "foot or end" were to be construed strictly, and that if the signature did not immediately follow under the dispositive part of the will, and in such a manner that nothing could be written between the signature and the last words, the will was not properly executed (*h*). To obviate the inconveniences arising from these decisions, it was enacted by statute 15 & 16 Vict. c. 24 :—

—repealed by 15 & 16 Vict. c. 24.

"1. That where by an act of 1 Vict. (c. 26), it is enacted that no will shall be valid unless it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction, every will shall so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this act, if the signature shall be so placed at (*i*), or after, or following (*k*), or under, or beside, or opposite to (*l*) the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect, by such his signature, to the writing signed as his will (*m*), and no such will shall be affected by the circumstance that the signature shall not follow or be immediately (*n*) after the foot or end of the will, or by the circumstance that a blank space shall intervene

(*h*) See the decisions on this point collected and observed upon, Sugd. R. P. Statutes.

(*i*) *In b. Woodley*, 33 L. J. P. 154.

(*k*) *In b. Wright*, 34 L. J. P. 104.

(*l*) *In b. Williams*, L. R. 1 P. & D. 4, and cases there cited; *In b. Ainsworth*, L. R. 2 P. & D. 151; *Royle* v. *Harris*, [1895] P. 163.

(*m*) *In b. Hammond*, 32 L. J. P. 200, where the will was folded up and signed by the testator on the outside, so that the witnesses could not see anything of the will; so in *In b. Pearsons*, 33 L. J. P. 177. In *Trott* v. *Trott*, 29 L. J. P. 156, the testator's name occurring as the last word of a holograph will, was held a sufficient signature. In *Lewis* v. *Lewis*, [1908] P. 1, the testator wrote the dispositive part of the will on one sheet of paper, and at the bottom of this the witnesses wrote their names; on the top of another sheet the testator wrote a kind of declaration as to the paper being his will, commencing, "I, David Lewis,": he acknowledged this as his signature, and it was held to be a sufficient execution. The case is referred to *ante*, p. 97. In *Sweetland* v. *Sweetland*, 34 L. J. P. 42, the first five sheets were signed and attested, but not the sixth and last, and the whole was rejected. See also *Margary* v. *Robinson*, 12 P. D. 8; *In b. Hughes*, *ib.* 107, in each of which cases the signature was written in the wrong place.

Parol evidence is admissible to show *quo animo* the testator signed his name : *Dunn* v. *Dunn*, L. R. 1 P. & D. 277.

(*n*) *Page* v. *Donovan*, 3 Jur. (N.S.) 220, where the signature was at the end of a notarial certificate, immediately following the will, and detailing the circumstances under which it was made, and it was held good.

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15 & 16 Vict. c. 24.

between the concluding word of the will and the signature (*o*), or by the circumstance that the signature shall be placed among the words of the testimonium clause (*p*), or of the clause of attestation (*q*), either with or without a blank space intervening, or shall follow, or be after, or under, or beside, the attestation clause (*r*), or the names (*s*), or one of the names, of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will shall be written above the signature (*t*), or by the circumstance that there shall appear to be sufficient space (*u*) on or at the bottom of the preceding side or page, or other portion of the same paper, on which the will is written, to contain the signature, and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said act or this act shall be operative to give effect to any disposition or direction which is underneath, or which follows it (*x*) : nor shall it give

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(*o*) See *In b. Fuller*, [1892] P. 377, where the whole of the disposing portion of a will was written on the first side of a sheet of foolscap; the second and third sides were blank, and the attestation clause and signatures were on the fourth side. It was held that the will was duly executed.

(*p*) *In b. Mann*, 28 L. J. P. 19; *In b. Torre*, 8 Jur. (N.S.) 494; *In b. Dinmore*, 2 Rob. 641; *In b. Cotton*, 6 N. of C. 307.

(*q*) *In b. Walker*, 31 L. J. P. 62; *In b. Huckvale*, L. R. 1 P. & D. 375; *In b. Casmore*, *ib.* 653; *In b. Pearn*, 1 P. D. 70; *In b. Moore*, [1901] P. 44; *In b. Chaplyn*, 10 Jur. 210.

(*r*) *In b. Standley*, 7 N. of C. 69.

(*s*) *In b. Jones*, 34 L. J. P. 41; *In b. Puddephatt*, L. R. 2 P. & D. 97; *In b. Horsford*, L. R. 3 P. & D. 211; *In b. Usborne*, 25 T. L. R. 519.

(*t*) *In b. Horsford*, L. R. 3 P. & D. 211; *In b. Williams*, L. R. 1 P. & D. 4; *In b. Brown*, 16 Jur. 602. If, however, at the time of execution the paper is so folded that no writing is visible, it must be proved that the will was written before the testator signed : *In b. Hammond*, 32 L. J. P. 200.

(*u*) *In b. Williams*, L. R. 1 P. & D. 4; *Hunt* v. *Hunt*, *ib.* 209; *In b. Archer*, L. R. 2 P. & D. 252.

(*x*) *In b. Greata*, 2 Jur. (N.S.) 1172; *In b. Dallow*, L. R. 1 P. & D. 189; *In b. Woods*, *ib.* 556; *In b. White*, [1896] 1 Ir. R. 269; in all these cases the appointment of executors followed the signature. But in a few cases the Court has been satisfied by the mode of writing, or by the context, that a part which physically followed the signature belonged properly to that which preceded it, as in *In b. Ainsworth*, L. R. 2 P. & D. 151. So where a sentence, which want of space prevented being completed at the bottom of a page, was continued, with an asterisk of reference, on a previous page, or at the back : *In b. Kimpton*, 33 L J. P. 153; *In b. Birt*, L. R. 2 P. & D. 214 (the heir-at-law consented, but the decision is clearly wrong); and see *In b. Wilkinson*, L. R. 6 P. D. 100 (alteration); *In b. Greenwood*, [1892] P. 7. In *In b. Anstee*, [1893] P. 283, probate was granted of one page only of a will signed by the testator, containing an unfinished sentence completed on the next page. Compare *In b. White*, 30 L. J. P. 55; *In b. Gee*, 78 L. T. 843; *In b. Dearle*, 47 L. J. P. 45; *Millward* v. *Buswell*, 20 T. L. R. 714. So where the will was written on the first and third sides, which it filled, and the signature was written cross-ways on the second : *In b. Coombs*, L. R. 1 P. & D. 302. And where, a lithographed form occupying the first page, the will was written on and filled the second and third, but was signed in the form, this was held good. *In b. Wotton*, L. R. 3 P. & D. 159. (See the remarks on this case in *Royle* v. *Harris*, [1895] P. 163, and compare *In b.*

effect to any disposition or direction inserted after the signature shall be made (*y*).

"2. The provisions of this act shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered by a Court of competent jurisdiction, in consequence of the defective execution of such will, or where the property, not being within the jurisdiction of the Ecclesiastical Courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto, in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the will, by a Court of competent jurisdiction, in consequence of the defective execution of such will."

The wording of this statute may perhaps seem needlessly particular to the reader who has not consulted the decisions which led to its enactment; but it is unnecessary to treat of those decisions here since the 2nd section of the statute renders it impossible that the validity of any will should now be determined by them.

VI.—Acknowledgment of Testator's Signature.—The statute 1 Vict. c. 26, placed the law with regard to the acknowledgment of wills on a new footing. The signature of the testator is to be "made" or "acknowledged" (the "signature," and not, as formerly, the "will," being the subject of acknowledgment) in the simultaneous presence of the witnesses (*z*), whereas formerly the signature might be "made" before one, and the will acknowledged before the rest, or acknowledged before all the witnesses separately, without any of them having seen the signature.

As to this point, the following decisions have been made with regard to acknowledgment :—

(a) The signature to be acknowledged may be made by the testator, or by another for him (*a*).

Gilbert, 78 L. T. 762, and *In b. Ffrench*, 23 L. R. Ir. 433; which was dissented from in *In b. Martin*, [1928] N. Ir. 138.) In all these cases it was proved that the part in question was written before execution. This proof failed in *In b. White*, 30 L. J. P. 55, and the part was rejected. See also *In b. Dearle*, 39 L. T. 93.

(*y*) *In b. Arthur*, L. R. 2 P. & D. 273.

(*z*) *Moore* v. *King*, 3 Curt. 243; 2 N. of Cas. 45; 7 Jur. 205; *Hindmarsh* v. *Charlton*, 8 H. L. C. 160; *Wyatt* v. *Berry*, [1893] P. 5. As to what is the "presence" of the witnesses, see *Smith* v. *Smith*, L. R. 1 P. & D. 143; and the cases on the "presence" of the testator, *post*, p. 107.

(*a*) *In b. Regan*, 1 Curt. 908. See *Burke* v. *Moore*, *ante*, p. 96, n. (*n*).

(b) A testator, whether speechless or not, may acknowledge his signature by gestures (*b*).

(c) There is no sufficient acknowledgment unless the witnesses either saw or might have seen the signature (*c*), not even though the testator should expressly declare that the paper to be attested by them is his will (*d*).

(d) When the witnesses either saw or might have seen the signature, an express acknowledgment of the signature itself is not necessary, a mere statement that the paper is his will (*e*), or a direction to them to put their names under his (*f*), or even a request by the testator (*g*), or by some person in his presence (*h*), to sign the paper, is sufficient (*i*).

(e) When the signature is seen or expressly acknowledged, it is not material that the witnesses are not told that the instrument is a will (*k*), or are deceived into thinking that it is a deed (*l*).

(f) It is of course sufficient, on a re-execution, merely to acknowledge the signature made on a former execution (*m*).

VII.—Attestation and Subscription by Witnesses.—The next statutory requisition is, that the will (*n*) be "attested and subscribed" by the witnesses.

(*b*) *In b. Davies*, 2 Rob. 337; and see *Parker* v. *Parker*, Milw. Ir. Eccl. Rep. 545.

(*c*) *In b. Harrison*, 2 Curt. 863; *Ilott* v. *Genge*, 3 Curt, 160; 4 Moo. P. C. C. 265; *In b. Swinford*, L. R. 1 P. & D. 630; *In b. Trinder*, 3 N. of C. 275; *In b. Ashton*, 5 N. of C. 548; *In b. Pearn*, 1 P. D. 70; *Kelly* v. *Keatinge*, Ir. R. 5 Eq. 174. Compare cases cited p. 99, n. (*m*) and see *Foulds* v. *Jackson*, 6 N. of C. Supp. 1.

(*d*) *Hudson* v. *Parker*, 1 Rob. 14; *Shaw* v. *Neville*, 1 Jur. (N.S.) 408; *In b. Gunstan, Blake* v. *Blake*, 7 P. D. 102; *Beckett* v. *Howe*, L. R. 2 P. & D. 1, *contra*, must be regarded as overruled.

(*e*) *In b. Davis*, 3 Curt. 748; *In b. Ashmore, ib.* 756; *Gwillim* v. *Gwillim*, 29 L. J. P. 31; *In b. Huckvale*, L. R. 1 P. & D. 375.

(*f*) *In b. Philpot*, 3 N. of C. 2; *Gaze* v. *Gaze*, 3 Curt. 451; and see other cases mentioned by Lord St. Leonards, R. P. Stat. pp. 338 *et seq.* (who seems to think that some of the decisions above cited are conflicting, or the earlier ones overruled by the later ones), and in Wms. Exors., Pt. I, Bk. II, Ch. II, s. 2.

(*g*) *In b. Thomson*, 4 N. of C. 643; *Keigwin* v. *Keigwin*, 3 Curt. 607; 7 Jur. 840; *Wright* v. *Sanderson*, 9 P. D. 149; *Daintree* v. *Butcher*, 13 P. D. 102.

(*h*) *In b. Bosanquet*, 2 Rob. 577; *Faulds* v. *Jackson*, 6 N. of C. Supp. 1; *In b. Jones*, 1 Jur. (N.S.) 1096; *Inglesant* v. *Inglesant*, L. R. 3 P. & D. 172; *In b. Bishop*, 30 W. R. 567. But see *Morritt* v. *Douglas*, L. R. 3 P. & D. 1, where the evidence failed to convince the Court that the testator was aware of the request of the third party.

(*i*) The decision in *In b. Arthur*, L. R. 2 P. & D. 273, seems open to question; and see *In b. Rawlins*, 2 Curt. 326; *In b. Pattison*, [1918] 2 Ir. R. 90.

(*k*) *Keigwin* v. *Keigwin*, 3 Curt. 607; *Faulds* v. *Jackson*, 6 N. of C. Supp. 1; *In b. Moore*, [1901] P. 44.

(*l*) Sugd. R. P. Stat. p. 340; but see the observations of Sir H. J. Fust, in *Willis* v. *Lowe*, 5 N. of C. 432.

(*m*) *In b. Dewell*, 17 Jur. 1130.

(*n*) See *In b. Topham*, 7 N. of C. 272, where an addition to the will was made after one witness had signed.

Simultaneous presence of witnesses.

It follows from what has been above stated that the will must be signed by or for the testator, and his signature must be acknowledged, before either of the witnesses signs (*o*). The signature must be made or acknowledged in the presence of the witnesses simultaneously, and not at different times (*p*), and they must themselves subscribe their names in the presence of the testator (*q*), though not necessarily in the presence of each other (*r*).

What a sufficient subscription; —a mark; —initials;

A mark has been decided to be a sufficient subscription (*s*); but it is never advisable, where it can be avoided (and, now that the art of writing is so common, seldom necessary), to employ marksmen as witnesses. The initials of the witnesses also amount to a sufficient subscription, if placed for their signatures, as attesting the execution (*t*); but not if they are placed in the margin opposite to, and apparently for the purpose only of identifying, alterations (*u*). A witness need not sign his own name, if the name actually subscribed be intended to represent his name (*x*) : or a description (without any name) is sufficient, if intended to identify him as witness (*y*). But if a wrong name be signed with the intention of making it appear that the will was attested by the person to whom that name belongs, instead of the actual witness, the subscription is insufficient (*z*).

—wrong name;

(*o*) *In b. Olding*, 2 Curt. 865; *In b. Byrd*, 3 Curt. 117; *Cooper* v. *Bockett*, *ib.* 648; *Charlton* v. *Hindmarsh*, 1 Sw. & Tr. 433; *Hindmarsh* v. *Charlton*, 8 H. L. C. 160. See also *In b. Summers*, 2 Rob. 295, where, however, the testator acknowledged the will (if anything) and not his signature. As to what is sufficient evidence that the testator signed before the witnesses in cases where there is no direct proof that they saw the testator's signature, see *Cooper* v. *Bockett*, *supra*; *Gwillim* v. *Gwillim*, 29 L. J. P. 31; *Pearson* v. *Pearson*, L. R. 2 P. & D. 451; *Fischer* v. *Popham*, L. R. 3 P. & D. 246; *Wright* v. *Sanderson*, 9 P. D. 149. In *Burke* v. *Moore*, Ir. R. 9 Eq. 609, the will had been signed by another person at the testator's request, and attested, but even if this execution was good (as to which see *ante*, p. 96), the testator destroyed the effect of it by himself signing the will with a mark after the witnesses had written their names.

(*p*) *In b. Allen*, 2 Curt. 331; *In b. Simmonds*, 3 *ib.* 79; *Moore* v. *King*, *ib.* 243; *Wyatt* v. *Berry*, [1893] P. 5; *Brown* v. *Skirrow*, [1902] P. 3; *Rolleston* v. *Sinclair*, [1924] 2 Ir. R. 157.

(*q*) *In b. Norton*, 2 Jur. (N.S.) 309.

(*r*) *Faulds* v. *Jackson*, 6 N. of C. Supp. 1; Sugd. R. P. S. 342. The dictum *contra* in *Casement* v. *Fulton*, 5 Moo. P. C. C. 140, has not been followed in *In b. Webb*, 1 Deane, 1. See also *British Museum* v. *White*, 3 M. & Pay. 689; *Sullivan* v. *Sullivan*, 3 L. R. Ir. 299. See Sol. J., vol. liii, pp. 212, 482.

(*s*) *Harrison* v. *Harrison*, 8 Ves. 185; *Addy* v. *Grix*, *id.* 504; *In b. Amiss*, 2 Rob. 116; *In b. Ashmore*, 3 Curt. 756; *Clarke* v. *Clarke*, 5 L. R. Ir. 47 (a strong case).

(*t*) *In b. Christian*, 2 Rob. 110.

(*u*) *In b. Martin*, 1 Rob. 712; *In b. Cunningham*, 29 L. J. P. 71. See also *In b. Shearn*, 50 L. J. P. 15; *In b. Streatley*, [1891] P. 172.

(*x*) *In b. Olliver*, 2 Spinks, 57.

(*y*) *In b. Sperling*, 33 L. J. P. 25. Whatever is written, it must be with the intention that it shall represent the writer's name or otherwise identify him : *In b. Eynon*, L. R. 3 P. & D. 92; *In b. Maddock*, *ib.* 169.

(*z*) *Pryor* v. *Pryor*, 29 L. J. P. 114; *In b. Leverington*, 11 P. D. 80.

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—sealing; —guiding the hand.

And if the witness signs part of his full name in such a way as to show that he does not intend it as a complete signature, this is no attestation (*a*). Sealing is not sufficient (*b*). If the witness cannot write, his hand may be guided by another person (*c*), or another person may write the witness's name while the witness holds the top of the pen (*d*); in fact, there seems to be no distinction in these respects between the words "sign" and "subscribe"; any act, therefore, which, as before noticed, would be a good signature by a testator, would be a good signature by a witness,—with, however, these exceptions, that the subscription of the witness is required to be made in the presence of the testator, and must not, as in the case of a testator, be a signature made by some other person for the witness, or by the witness himself at some other time, and merely acknowleged by him in the presence of the testator (*e*).

Difference between signature by witness and by testator.

Must be an act apparent on the paper,

Where the will has been once attested by a witness, it is not sufficient for him, on a re-execution, to go over his name with a dry pen; he must do some act apparent on the face of the paper (*f*); otherwise it is no more than an acknowledgment. And where a witness to a former execution, on attesting a will for the second time, did not again write her name, but after her name written on the first execution, wrote the name of her residence, "Bristol," Sir H. J. Fust considered that to be no proof of the attestation, and decided that the will was not properly re-executed (*g*). So where a witness to a former execution, on attesting a re-execution of a will, wrote the day of the month against his former signature, and crossed one of the letters in it, not intending that the mark made by crossing the letter should stand for his signature, but supposing that the addition of the date was equivalent to a repetition of the signature, it was held by Sir C. Cresswell that the will was not duly re-executed (*h*). In these cases the attestation was insufficient, because there was no proof that the word "Bristol" in the one case, and the mark across the letter in the other, were intended to represent the witness's signature. They were nothing more

(*a*) *In b. Maddock*, L. R. 3 P. & D. 169; *M'Conville* v. *M'Creesh*, 3 L. R. Ir. 73.

(*b*) *In b. Byrd*, 3 Curt. 117. But see *ante*, p. 96.

(*c*) *Harrison* v. *Elvin*, 3 Q. B. 117; *In b. Frith*, 27 L. J. P. 6.

(*d*) *In b. Lewis*, 31 L. J. P. 153. But *prima facie* not so if the witness can write, *In b. Kileher* (or *Kilcher*), 6 N. of C. 15.

(*e*) *Moore* v. *King*, 3 Curt. 243; *In b. Cope*, 2 Rob. 335; *In b. White*, 7 Jur. 1045; *In b. Mead*, 1 N. of C. 456; *In b. Duggins*, 39 L. J. P. 24; *Horne* v. *Featherstone*, 73 L. T. 32.

(*f*) *Playne* v. *Scriven*, 1 Rob. 772; *In b. Cunningham*, 29 L. J. P. 71; *In b. Maddock*, L. R. 3 P. & D. 169; *Horne* v. *Featherstone*, *supra*.

(*g*) *In b. Trevanion*, 2 Rob. 311.

(*h*) *Charlton* v. *Hindmarsh*, 1 Sw. & Tr. 433; *Hindmarsh* v. *Charlton*, 8 H. L. C. 160.

than acknowledgments of the former signatures. The signature must be such as is descriptive of the witness, whether by a mark, or by initials, or by his full name (*i*), or by a description without name (*k*); a view which necessarily denies efficacy as a signature to the writing of the date.

—and descriptive of the witness.

The signature of the witnesses may be placed in any part of the will; for instance, the will ending on the first side of a sheet of letter paper, the witnesses may sign on the fourth side (*l*); and the will ending on the middle of the third side, and two of the witnesses signing at the end, and another signing in a vacant space on the second side opposite the other two, was held a sufficient attestation by three witnesses under the Statute of Frauds (*m*). And if the witnesses sign their names opposite alterations in the will, and not in the proper place, it may be proved by parol evidence that they intended to attest the testator's signature (*n*). So where they sign in a blank space in the body of the will (*o*). But it must of course be proved that any part of the will which follows the signatures of the witnesses was written before they signed (*p*). An attestation clause is not required (*q*).

Position of witness's signature.

A will may be composed of several clauses written at distinct intervals, and one memorandum of attestation subscribed to the last part may apply to the whole, including as well what was long before written as what had been recently added, though the antecedent part bears a different date, and is complete in itself, independently of the latter (*r*). And the same general doctrine applies to a will whose contents are distributed through several sheets of paper, which would be adequately attested by a single memorandum, provided all the detached parts were present when the act of attestation took place; and which fact it seems would be presumed, unless the contrary were distinctly proved (*s*), as would also that of the attestation being intended to apply to the whole. The presumption would be somewhat less strong, of course, when each of the several papers has a distinct independent character, as where one is a will and the other a codicil, or where they consist of two separate codicils: and would fail

Applicability of attestation to several distinct parts of a will;

—to several testamentary papers;

—to will and codicil.

(*i*) *Per* Lord Chelmsford, 8 H. L. Ca. 171.

(*k*) *In b. Sperling*, 33 L. J. P. 25.

(*l*) *In b. Chamney*, 1 Rob. 757; *In b. Braddock*, 1 P. D. 433; *In b. Fuller*, [1892] P. 377; *ante*, p. 100.

(*m*) *Roberts* v. *Phillips*, 4 E. & B. 450.

(*n*) *In b. Streatley*, [1891] P. 172.

(*o*) *In b. Ellison*, [1907] 2 Ir. R. 480.

(*p*) *In b. Jones*, 1 N. of C. 396. See *Byles* v. *Cox*, 74 L. T. 222, where the signature of one witness appeared above that of the testator.

(*q*) *Post*, p. 109.

(*r*) *Carleton* v. *Griffin*, 1 Burr. 549; *In b. Cattrall*, 33 L. J. P. 106; see *post*, p. 121.

(*s*) *Bond* v. *Seawell*, 3 Burr. 1775.

altogether where the memorandum does not follow the whole. Thus where will and codicil were on different sheets found pinned together, the codicil being signed by the testatrix but not attested, an attestation clause written on the back of the will was not held to be applicable to the codicil without proof that it was so intended, and that the sheets were pinned together at the time of subscription (*t*). So where there is an evident intention that each paper or sheet shall be separately attested; as, where a testator signed five sheets, and the witnesses subscribed the first four, and the fifth sheet contained an attestation clause only, and there was no evidence to show that the witnesses attested the last signature, the will was held not to have been properly executed (*u*); and where two instruments purporting to be a will and codicil were written on different pages of the same sheet of paper, and both were signed by the testatrix but the first alone was attested, the codicil was rejected (*x*).

Duplicate will.

A will written in duplicate is not duly executed by the testator signing one copy, and the witnesses attesting and subscribing the other (*y*).

Animus attestandi.

In every case the Court must be satisfied that the names were written *animo attestandi*; and their position may for this purpose be material; where, for instance, on one page the will was written, signed by the testator and subscribed by one witness, and on the next page a memorandum or inventory of property was written, to which three names were subscribed, it was held that these names could not be deemed to have been so placed *animo attestandi* (*z*), though it would not necessarily follow that a person did not sign as a witness because he also intended his signature to serve another purpose, *e.g.*, his acceptance of the executorship (*a*).

Where an executed will was altered, and the witnesses put their initials in the margin opposite the alterations, it was held that the will was not properly re-executed (*b*). But this decision seems questionable, for the initials were intended to represent the signatures, and it was proved (extrinsic evidence being

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(*t*) *In b. Braddock*, 1 P. D. 433. As to the kind of attachment required where the will is on several sheets of paper, see *In b. Gausden*, 31 L. J. P. 53, and other cases cited *ante*, p. 97.

(*u*) *Ewen* v. *Franklin*, 1 Deane, 7; *Sweetland* v. *Sweetland*, 34 L. J. P. 42; *In b. Dilkes*, L. R. 3 P. & D. 164; *Phipps* v. *Hale*, *ib.* 166.

(*x*) *In b. Taylor*, 2 Rob. 411; and see *per* Lord Campbell, 24 L. J. Q. B. 175; *In b. Pearse*, L. R. 1 P. & D. 382; *Woodroofe* v. *Creed*, [1894] 1 Ir. 508.

(*y*) *In b. Hatton*, 6 P. D. 204.

(*z*) *In b. Wilson*, L. R. 1 P. & D. 269. See also *Dunn* v. *Dunn*, *ib.* 277, referred to *ante*, p. 98.

(*a*) *Griffiths* v. *Griffiths*, L. R. 2 P. & D. 300.

(*b*) *In b. Martin*, 6 N. of C. 694.

admissible on this question) that they were written with the intent to attest the will.

Sometimes it is important to prove that a person who writes his name on a will does not do so as witness; for example, where he is a legatee under the will (*c*).

P. O. nomination.

It may be mentioned that a nomination of monies in the Post Office Savings Bank has to be in writing and signed by the nominator in the presence of a witness (*d*).

"Presence" of testator.

VIII.—Subscription in "Presence" of Testator.—The will, it will be observed, is required to be subscribed by the witnesses, in the "presence" of the testator (*e*). The design of the Legislature, in making this requisition, evidently was, that the testator might have ocular evidence of the identity of the instrument subscribed by the witnesses; and this design has been kept in view by the Courts in fixing the signification of the word "presence." To constitute "presence," in the first place, it is essential that the testator should be mentally capable of recognising the act which is being performed before him; for, if this power be wanting, his mere corporal presence would not suffice. Thus, if a testator, after having signed and published his will, and before the witnesses subscribe their names, falls into a state of insensibility (whether permanent or temporary) the attestation is insufficient (*f*).

Mental consciousness essential.

And the testator ought not merely to possess the mental power of recognising, but be actually conscious of, the transaction in which the witnesses are engaged; for if a will were attested in a secret and clandestine manner, without the knowledge of the testator, the fact of his being in the room in which it was done would not avail (*g*). Nor, on the other hand, would the circumstance of the testator not being in the same room invalidate the attestation if it took place within his view. Thus, in the case of *Shires* v. *Glascock* (*h*), the testator being in extreme illness, the witnesses after he had signed his will withdrew into a gallery, between which and the testator's chamber there was a lobby with glass doors, and the glass broken in some places; in this gallery the witnesses subscribed the will; it was proved that the testator might have seen from his bed, through

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(*c*) *Dunn* v. *Dunn*, L. R. 1 P. & D. 277; *In b. Sharman*, *ib.* 661; *In b. Murphy*, Ir. R. 8 Eq. 300; *In b. Smith*, 15 P. D. 2.

(*d*) *Pearman* v. *Charlton*, 44 T. L. R. 517. See *ante*, p. 38.

(*e*) This requirement was also made by the Statute of Frauds in the case of wills of lands.

(*f*) *Right* v. *Price*, Doug. 241.

(*g*) See *Longford* v. *Eyre*, 1 P. W. 740; *Jenner* v. *Ffinch*, 5 P. D. 106.

(*h*) 2 Salk. 688. See also *Davy* v. *Smith*, 3 Salk. 395; *In b. Trimnell*, 11 Jur. (N.S.) 248.

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the lobby and the broken glass window, the table in the gallery where the witnesses subscribed; and this was adjudged to be sufficient; for (it was observed) the statute required attesting in his presence to prevent obtruding another will in place of the true one; here the signing was within view of the testator; he might have seen it, and that was enough. And if the witnesses subscribe their names in the same room where the testator lies, though the curtain of the bed be drawn close, it is a good subscribing, because it is in his power to see them, and what is done shall be construed to be in his presence (*i*).

Sufficient if the testator might have seen.

It is not even necessary that the testator should be in the same house with the witnesses. In *Casson* v. *Dade* (*k*), where a feme covert, having power to make a writing in the nature of a will, executed the instrument in her carriage outside her attorney's office, the witnesses attending her; after having seen the execution, they returned into the office to subscribe it; and it was sworn by a person in the carriage that the testatrix might have seen what passed through the window of the office; Lord Thurlow was of opinion that the will was well executed.

Testator and witnesses need not be in same house.

Upon the same principle it is clear, that the mere contiguity of the places occupied by the testator and the witnesses respectively will not suffice, if the testator's view of the witnesses' proceedings is necessarily obstructed. Thus, in *Eccleston* v. *Petty* (*l*), where the witnesses proved that the testatrix signed the will in her bedchamber, and they subscribed it in the hall, and it was not possible from her chamber to see what was done at the table in the hall, there being a passage and eight or ten turning stairs between those places, the will was held not to be duly attested (*m*).

Mere contiguity not sufficient, if the testator's view be interrupted.

And it was not enough, that in another part of the same room the testator might have perceived the witnesses, if in his actual position he could not (*n*). And, therefore, in *Doe* d. *Wright* v. *Manifold* (*o*), where the testator was in bed in a room, from one part of which he might, by inclining his head into the passage, have seen the witnesses attest the will, but not in the situation in which he was, the attestation was decided not to be good. Lord Ellenborough said: "In favour of attestation it is presumed, that if the testator might see, he did see; but I am afraid, that if we get beyond the rule which requires that the

Testator must be capable of seeing in his actual position.

(*i*) *Newton* v. *Clarke*, 2 Curt. 320.

(*k*) 1 Br. C. C. 99, Dick. 586.

(*l*) Carth. 79, and see *In b. Colman*, 3 Curt. 118; *In b. Ellis*, 2 Curt. 395; *In b. Newman*, 1 Curt. 914.

(*m*) *Carter* v. *Seaton*, 85 L. T. 76, is to the same effect.

(*n*) *Brown* v. *Skirrow*, [1902] P. 3.

(*o*) 1 M. & Sel. 294; *Norton* v. *Bazett*, 1 Deane, 259; *Jenner* v. *Finch*, 5 P. D. 106.

witnesses should be actually within reach of the organs of sight, we shall be giving effect to an attestation out of the devisor's presence, as to which the rule is, that where the devisor cannot by possibility see the act doing, that is out of his presence."

Where a testator is unable to move without assistance; —where he is blind.

If the testator be unable to move without assistance, and have his face turned from the witnesses, so that it is out of his power to see them, if he so wished, the attestation will be insufficient (*p*). Where the testator is blind, it has been decided that the position of the witnesses must be such, that the testator, if he had had his eyesight, might have been able to see them sign (*q*).

Where the evidence fails to show in what part of the room the subscription took place, it would be presumed that the most convenient was the actual spot, and the ordinary position of a table, likely to have been used, would be taken into consideration (*r*).

It is scarcely necessary to add, that the nature of the occasion of the witnesses' absence, whether for the ease or at the solicitation of the testator or otherwise, is wholly immaterial (*s*).

Due execution when presumed.

IX.—Attestation Clause unnecessary.—A form of attestation is expressly dispensed with by the statute 1 Vict. c. 26. No particular form of words was essential even under the old law to constitute an attestation (*t*). And accordingly, probate has been granted of a will where both the witnesses deposed that the requirements of the Act had not been complied with, the Court being satisfied by the circumstances that the evidence was mistaken (*u*); and in another case, where the witnesses so deposed, but not positively, their evidence was allowed to be rebutted by that of another person present at the execution, assisted by the attestation clause, whence it appeared that the

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(*p*) *Tribe* v. *Tribe*, 1 Rob. 775.

(*q*) *In b. Piercy*, 1 Rob. 278.

(*r*) *Winchilsea* v. *Wauchope*, 3 Russ. 444.

(*s*) *Broderick* v. *Broderick*, 1 P. W. 239; *Machell* v. *Temple*, 2 Show. 288.

(*t*) As to the evidence of due attestation, under the old law, when the validity of the will was called in question, see *Hands* v. *James*, Comyn. 531; *Croft* v. *Pawlet*, 2 Str. 1109; *S. C.*, 8 Vin. Ab. 128, pl. 4; *Brice* v. *Smith*, Willes, 1; *Rancliffe* v. *Parkyns*, 6 Dow, 202; *Doe* v. *Davies*, 9 Q. B. 648; *Hitch* v. *Wells*, 10 Beav. 84. And as to when due execution would have been presumed, see *Hands* v. *James; Croft* v. *Pawlet, supra; In b. Seagram*, 3 N. of C. 436; *In b. Mustow*, 4 N. of C. 289; *In b. Johnson*, 2 Curt. 341; *In b. Luffman*, 5 N. of C. 183; *In b. Dickson*, 6 *ib.* 278; *Trott* v. *Trott*, 29 L. J. P. 156.

(*u*) *Leech* v. *Bates*, 6 N. of C. 699. *A fortiori*, where the adverse evidence of one witness is opposed by the affidavit of the other (deceased) witness, *Wright* v. *Rogers*, L. R. 1 P. & D. 678. So, where the witness had no precise recollection of what occurred, *Wright* v. *Sanderson*, 9 P. D. 149; *Woodhouse* v. *Balfour*, 13 P. D. 2; *In b. Colyer*, 14 P. D. 48; *Whiting* v. *Turner*, 89 L. T. 71. See *Foot* v. *Stanton*, 1 Deane, 19; 2 Jur. (N.S.) 380.

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requirements of the statute had been complied with (*x*). And in a case where the attestation clause stated that the will was signed in the presence of the attesting witnesses, and it appeared from the evidence that it was only acknowledged in their presence, having been signed before they were called in, probate was granted (*y*). But where there was nothing but a formal attestation clause on one side, and the adverse testimony of both witnesses on the other, probate was refused (*z*).

Presumption not always made.

As a general rule, the presumption of compliance with the statutory requirements will not be made, unless the will appears on the face of it to have been duly executed. But if the will is found among the testators' papers at his death, and there are no suspicious circumstances, due execution may be presumed, even if there is no attestation clause (*a*). And in a case (*b*), where the will was signed by the testatrix and two other persons (both of whom were dead), without any attestation clause, the rule "*omnia præsumuntur rite esse acta*" enabled the Court to hold the will duly executed, although there was no evidence to prove the handwriting of one of the alleged witnesses. If the will is lost, due execution must be proved (*c*), and the testator's written declarations of the fact are insufficient, though accompanied by a document referred to by him as a copy of his will, and representing the will as duly executed (*d*). The presumption of due execution is clearly rebutted where it is sworn by competent persons that the names of the seeming witnesses are fictitious, and are in the testator's own handwriting (*e*).

Attestation clause is unnecessary.

The provision in the statute 1 Vict. c. 26, enacting that no

(*x*) *Bayliss* v. *Sayer*, 3 N. of C. 22; see also *Gove* v. *Gawen*, 3 Curt. 151; *Blake* v. *Knight*, *ib.* 547; *Pennant* v. *Kingscote*, *ib.* 642; *In b. Hare*, *ib.* 54; *Cooper* v. *Bockett*, *ib.* 648; *Brenchley* v. *Still*, 2 Rob. 162; *Chambers* v. *Queen's Proctor*, 2 Curt. 433; *Keating* v. *Brooks*, 4 N. of C. 253; *In b. Noyes*, *ib.* 284; *Burgoyne* v. *Showler*, 1 Rob. 5; *Thomson* v. *Hall*, 16 Jur. 1144; *In b. Attridge*, 6 N. of C. 597; *Bennett* v. *Sharp*, 1 Jur. (N.S.) 456; *Farmar* v. *Brock*, 2 Jur. (N.S.) 670; *In b. Holgate*, 29 L. J. P. 161; *Lloyd* v. *Roberts*, 12 Moo. P. C. C. 158; *In b. Thomas*, 28 L. J. P. 33; *Gwillim* v. *Gwillim*, 29 L. J. P. 31; *Cregreen* v. *Willoughby*, 6 Jur. (N.S.) 590; *In b. Huckvale*, L. R. 1 P. & D. 375; *Smith* v. *Smith*, *ib.* 143 (where witness saw testatrix writing, but did not see her signature).

(*y*) *In b. Moore*, [1901] P. 44.

(*z*) *Croft* v. *Croft*, 34 L. J. P. 44; *Wyatt* v. *Berry*, [1893] P. 5. But see *Wright* v. *Sanderson*, 9 P. D. 149, *ante*, p. 104, n. (*u*).

(*a*) See the cases cited *ante*, p. 94.

(*b*) *In b. Peverett*, [1902] P. 205. Compare *Harris* v. *Knight*, 15 P. D. 170.

(*c*) As in *In b. Gardner*, 27 L. J. P. 55; *Eckersley* v. *Platt*, L. R. 1 P. & D. 281. The contents of the will and its existence at the testator's death must also be proved, *post*, pp. 140 *seq.* Where the will has been lost since the testator's death, see *Harris* v. *Knight*, 15 P. D. 170, *ante*, p. 94.

(*d*) *In b. Ripley*, 1 Sw. & Tr. 68; *Atkinson* v. *Morris*, [1897] P. 40; *Eyre* v. *Eyre*, [1903] P. 131.

(*e*) *In b. Lee*, 4 Jur. (N.S.) 790.

form of attestation shall be necessary, has been much observed upon; but it seems to mean only that no clause need be appended to the will, stating that the requirements of the Act have been complied with (*f*); and is not inconsistent with the provision that the witnesses are to "attest," as well as subscribe the will, the word "attest" meaning merely to act as a witness, which might in fact be done without subscription (*g*); although upon the construction of the Act it may be that no attestation will satisfy its requirements, except through the outward mark of subscription (*h*). The "subscription," "attestation," and "form of attestation," thus refer to matters essentially different (*i*).

Suggestion as to framing attestation clauses.

Still, it will be the duty of persons who superintend the execution of wills, not to be content with a bare subscription of the witnesses' names, but to make them subscribe a memorandum of attestation, recording the observance of all the circumstances which the statute makes necessary to constitute a valid execution; (*i.e.*, that the signature was made, or acknowledged, by the testator in the presence of the witnesses, both being present at the same time, and that they subscribed their names in his presence); for though such statement in the memorandum of attestation is not conclusive, and does not preclude inquiry into the fact, it would afford a much stronger presumption that the statutory requisition had been complied with, than where it is wanting; and in the absence of such a memorandum, the witnesses are always called upon by the Court of Probate to make an affidavit that the statute was in fact complied with. It will not be advisable for a testator, except where absolutely necessary, to avail himself of the privilege, which the Wills Act expressly confers, of acknowledging the signature before the witnesses, instead of signing it in their presence, or of the permission to sign by the hand of another. The latter expedient, indeed, ought to be restricted in practice (though the Legislature has not so limited it) to cases of extreme physical weakness, rendering it impossible or difficult for the testator to write his name; in such cases, even the exertion of making a mark might be oppressive. Where a testator is unable to write from ignorance, perhaps a mark is to be preferred to a signature by the hand of another, as being the more usual mode of execution by

As to testator's signature.

As to signing by mark, or by amanuensis.

(*f*) *Bryan* v. *White*, 14 Jur. 919.

(*g*) *Ricketts* v. *Loftus*, 4 Y. & C. 919; and see *Freshfield* v. *Reed*, 9 M. & Wels. 404; *Burdett* v. *Spilsbury*, 10 Cl. & Fin. 340; *Hudson* v. *Parker*, 1 Rob. 14; 8 Jur. 788. See *Ford* v. *Kettle*, L. R. 9 Q. B. D. 139, a bill of sale case.

(*h*) See *per* Sir C. Cresswell, *Charlton* v. *Hindmarsh*, 28 L. J. P. 132.

(*i*) An attestation clause, if used, is no part of the will, and any words in the clause purporting to describe the operation of a testamentary instrument, such as "whereby the first codicil is cancelled," do not affect the construction or effect of the instrument: *In b. Atkinson*, L. R. 8 P. D. 165.

illiterate persons; for in regard to this and all other particulars, the prudent course is to make the execution of the will conform as much as possible to the testator's ordinary mode of executing instruments. Where the will is signed by a third person on behalf of the testator, the signature, of course, should, though as we have before seen, it need not necessarily, be in the name of the testator, rather than that of the amanuensis, who should merely be designated in the memorandum of attestation, where it would be proper (though not necessary) that the peculiar mode of execution should be stated.

Attesting witnesses not required to be credible.

X.—Credibility of Witnesses.—It will be observed, that in clause 9 of the Act, which regulates the attestation of wills, the Legislature has dropped the requisition of credibility, as an ingredient in the qualification of the witnesses; and has, moreover (section 14), expressly provided, that if any person who shall attest the execution of a will shall, at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness, to prove the execution thereof, such will shall not on that account be invalid.

Persons incompetent to give evidence qualified.

"It seems to have been generally considered," Mr. Jarman remarks (*k*), "that this provision not only qualifies persons who have been rendered infamous by conviction for crime to be attesting witnesses (as it clearly does), but, that it even gives validity to the attesting act of an idiot or lunatic. This, however, seems very questionable. The signature, it will be observed, is required to be made or acknowledged by the testator in the *presence* of the witnesses; which would seem to imply that they should be mentally conscious of the transaction, according to the construction which was given (as we have seen (*l*)) to the same word occurring in the devise clause of the Statute of Frauds, which required that the attesting witnesses should subscribe in the testator's 'presence'; such requisition being held not to be satisfied in a case in which the testator fell into a state of insensibility before the witnesses had subscribed their names to the memorandum of attestation; and the 14th section of the recent statute seems to be perfectly consistent with such a construction; for that clause does not in terms dispense with all personal qualifications in the witnesses to perform the act; it only removes the legal disqualification, arising out of his incompetency to give evidence of the fact in a judicial proceeding, which evidently may co-exist with intel-

Doubt whether qualification extends to lunatics, or other persons mentally incapable.

(*k*) First edition of this work, p. 102.

(*l*) *Ante*, p. 107, n. (*e*), and see the judgment of Dr. Lushington in *Hudson* v. *Parker*, 1 Rob. 14; 8 Jur. 786.

lectual capacity, as in the case of a person whose credibility of character has been destroyed by conviction for crime, a species of disqualification which was peculiarly inconvenient, as the testator might have been unaware of its existence, so that there was a special reason for its removal, which does not apply to palpable infirmity. Surely, if the legislature intended to enact so novel (not to say absurd) a doctrine, as that the functions of an attesting witness might be performed by any one who could scratch a paper without the least glimmering of intellectual consciousness, this would have been done in terms more clear and explicit, than by providing that persons incompetent to be admitted as witnesses to prove the execution of a will, should be sufficient attestators—expressions which seem rather to suppose a personal ability on the part of the witnesses to *perform* the act, but a legal disability to *prove* it. Perhaps the point is not very likely to occur in practice; for no testator would think of choosing an idiot (*m*) or lunatic as an attesting witness to his will, unless he were content to have his own sanity called in question. And here it may be observed, that the enlarged licence now given, in regard to the qualification of witnesses to wills, will not induce any prudent person to abate one jot of scrupulous anxiety that the duty of attesting a will be confided to persons, whose character, intelligence, and station in society, afford the strongest presumption in favour of the fairness and proper management of the transaction; and preclude all apprehension in purchasers and others, as to the facility with which the instrument could be supported in a court of justice, against any attempt to impeach it; and now that the requisite number of witnesses is reduced to two, it is the more easy, as well as important, that the selection should be governed by a regard to such considerations. A devise or bequest to an attesting witness still, as under the old law, does not affect the validity of the entire will, but merely invalidates the gift to the witness, whose competency the legislature has established, by destroying his interest; and hence the remarks on this enactment have more properly

Suggestion as to selection of witnesses.

(*m*) "Supposing such persons to be, technically speaking, competent attesting witnesses, the effect of employing two such witnesses would be to render it necessary to have recourse to the testimony of other persons, for the purpose of proving the circumstances of the execution, which could not, in such case, be done (as it usually is) out of the mouths of the witnesses themselves; and it is to be observed that, although in the case of a deceased witness, proof of handwriting is sufficient, the presumption being, that the will was duly attested, especially if the facts essential thereto were recorded in a memorandum of attestation, which was subscribed by the deceased, yet it does not follow that any such presumption would arise in the case of a lunatic witness, whose subscription (though his handwriting might be proved), could not be considered as affording any security that attention had been paid to the requisitions of the statute." (Note by Mr. Jarman.)

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found a place in the preceding chapter, which treats of the disqualifications of devisees " (*n*).

Should be identified.

XI.—Alterations.—Owing to the general rule that alterations, interlineations, etc., made in a will, are presumed to have been made after execution, it is always advisable, when alterations are made in a will before execution, to identify them by the initials of the testator and witnesses, or by a reference to them in the attestation clause. This matter is considered in the next Chapter, in connection with the subject of alterations made after execution.

Unattested alterations.

Unattested alterations in a will may be incorporated by reference or implication in a codicil (*o*).

As to incomplete papers.

XII.—Incomplete Wills.—Cases sometimes occurred under the old law, and may possibly arise under the present, in which something more than a mere compliance with legal requirements was made necessary to the efficacy of the will by the testator himself, he having chosen to prescribe to himself a special mode of execution; for in such case, if the testator afterwards neglects to comply with the prescribed formalities, the inference to be drawn from these circumstances is, that he had not fully and definitively resolved on adopting the paper as his will (*p*). The presumption is slight where the instrument is duly signed and attested, and perfect in all other respects, but must apparently be rebutted by some evidence before it can be admitted to probate (*q*).

Where, however, the testator's design of perfecting the paper is frustrated by sudden death, or insanity, or any other involuntary preventing cause, no inference of the absence of matured testamentary intention arises from the imperfect state of the document, which, therefore, notwithstanding its defect,

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(*n*) *Ante*, p. 80.

(*o*) *In b. Heath*, [1892] P. 253. Compare *Oldroyd* v. *Harvey*, [1907] P. 326, stated in Chap. VII.

(*p*) Accordingly, under the old law, which did not require wills of personalty to be authenticated by the testator's signature or by attestation, the Prerogative Court in several instances refused probate of wills, concluding with the words " In witness," etc., but not signed : *Abbot* v. *Peters*, 4 Hagg. 380; or to which an attestation clause had been added, but not used : *Beaty* v. *Beaty*, 1 Add. 154; see also *Doker* v. *Goff*, 2 Add. 42; *Walker* v. *Walker*, 1 Mer. 503; *Scott* v. *Rhodes*, 1 Phillim. 12; *Harris* v. *Bedford*, 2 Phillim. 177; *Stewart* v. *Stewart*, 2 Moo. P. C. C. 193. Questions as to the testamentary validity of incomplete papers rarely occur in practice, now that authentication of signature and attestation are essential to such validity.

(*q*) *Per* Sir J. Nicholl in *Beaty* v. *Beaty*. See also 1 Wms. Exors., Pt. 1., Bk. II, Ch. II, s. 2. It is obvious that such cases are not very likely to occur under the present law, and indeed the point does not even seem to have as yet arisen.

will be accepted as the will of the deceased, provided it fully discloses his testamentary scheme (*r*).

Contents of the paper must be complete.

But this doctrine in favour of imperfect papers obtains only where the defect is in regard to some formal act, which the testator has prescribed as necessary for the authentication of his will, and not where it applies to the contents of the instrument; for, if in its actual state the paper contains only a partial disclosure of the testamentary scheme of the deceased, it necessarily fails of effect, even though its completion was prevented by circumstances beyond his control (*s*).

Presumption against unfinished papers.

In short, the presumption is always against a paper which bears self-evident marks of being unfinished; and it behoves those who assert its testamentary character distinctly to show, either that the deceased intended the paper in its actual condition to operate as his will, or that he was prevented by involuntary accident from completing it (*t*). And probate will not be granted of such defective papers, without the consent or citation of the next-of-kin (*u*).

Informal paper intended as a present will.

It ought to be observed, however, that we are not to rank among inchoate or unfinished testamentary papers, one which is shown to have been intended to perform the office of a present will (if the expression may be allowed), though executed for a temporary purpose, as appears by the testator having designated it a "memorandum of an intended will," or "head of instructions," or "a sketch of an intended will which I intend to make when I get home," etc. And it has frequently occurred that a testator has ultimately adopted as his final will a paper so originally designed as instructions for, or in contemplation of, a more formal testament (*x*).

In all such cases, however, the Ecclestiastical Court required very distinct evidence of a testator eventually adhering to and

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(*r*) *Huntington* v. *Huntington*, 2 Phillim. 213; see also *Cary* v. *Askew*, 1 Cox, 241; *Allen* v. *Manning*, 2 Add. 490; *Bradford* v. *Young*, 29 Ch. D. 617 (unsigned will made in 1827).

(*s*) *Montefiore* v. *Montefiore*, 2 Add. 354; see also *Griffin* v. *Griffin*, 4 Ves. 197, n. This case afforded two sufficient grounds for the rejection of the paper; first, that it was not the whole will; and, secondly, that its completion was not prevented by inevitable circumstances. But loss of part of a will once complete does not necessarily exclude the remainder from probate: *Sugden* v. *Lord St. Leonards*, 1 P. D. 154; unless it substantially alters the sense of the remainder, *e.g.*, where a gift of residue alone remains, the part containing gifts of legacies being lost, see *Woodward* v. *Goulstone*, 11 A. C. 469.

(*t*) *Reay* v. *Cowcher*, 1 Hagg. 75, 2 *ib.* 249; *Wood* v. *Medley*, 1 *ib.* 661; *In b. Robinson*, *ib.* 643; *Bragge* v. *Dyer*, 3 Hagg. 207; *Gillow* v. *Bourne*, 4 Hagg. 192. As to the contrary presumption in favour of a regularly executed and apparently complete will, *vide Shadbolt* v. *Waugh*, 3 Hagg. 570; *Blewitt* v. *Blewitt*, 4 Hagg. 410.

(*u*) *In b. Adams*, 3 Hagg. 258.

(*x*) *Barwick* v. *Mullings*, 2 Hagg. 225; *Hattatt* v. *Hattatt*, 4 Hagg. 211; *Torre* v. *Castle*, 1 Curt. 303; 1 Wms. Exors. 72 *et seq.*, 8th ed.

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adopting, as his deliberate will, the preliminary document, in case he afterwards lived long enough to have executed a more complete instrument (*y*). But cases of this kind depend so much upon their particular circumstances, that little is to be learnt from general statements; and the inquirer into the subject is recommended to consult the cases referred to in the notes, a full statement of which the limits of the present work do not allow (*z*).

The execution of testamentary powers is treated of in Chapter XXIII.

Whether attestation of codicil applies to previous will.

XIII.—Defective Execution supplied by Reference, express or implied.—It remains to be considered in what cases a codicil, duly attested, communicates the efficacy of its attestation to an unattested will or previous codicil, so as to render effectual any devise or bequest which may be contained in such prior unattested instrument. It was repeatedly decided, in cases not affected by the Wills Act, where the several attested and unattested instruments were written on the same paper, that the latter were rendered valid (*a*). In these cases the attested codicil referred to the unattested document. Without a reference of some kind the mere fact that the two instruments are written on the same piece of paper, the attested one after the other, is not sufficient to incorporate them (*b*). But a very slight reference is sufficient (*c*).

Before the Wills Act. Remarks

The result would have been the same if the unattested will and the attested codicil had been detached; the only effect of their being united in the same paper being to render unnecessary any express reference to the unattested document for the purpose of identifying it. The observations which fell from the Court of K. B. in *Utterton* v. *Robins* (*d*) indicate a strong inclination in that Court to this opinion. And the point is not now open to question. Thus in *Aaron* v. *Aaron* (*e*), a testator made a will and two codicils, each on a separate paper; the first codicil was unattested; by the second the testator recited his will dated, etc.,

upon the preceding cases.

(*y*) *Dingle* v. *Dingle*, 4 Hagg. 388; *Coppin* v. *Dillon*, *ib.* 361. A subsequent complete will of course supersedes "Instructions for a Will." But sometimes the subsequent will refers to and incorporates the instructions; see *Wood* v. *Goodlake*, 1 N. of C. 144.

(*z*) This sentence is quoted by Lord Sterndale, M.R., in *Godman* v. *Godman*, [1920] P. at p. 270.

(*a*) *De Bathe* v. *Lord Fingal*, 16 Ves. 167; *Carleton* v. *Griffin*, 1 Burr. 549; *Doe* v. *Evans*, 1 Cr. & Mees. 42, 3 Tyr. 56. These cases are stated and discussed in the fourth edition of this work, Vol. I, p. 114.

(*b*) *In b. Drummond*, 2 Sw. & Tr. 8; *In b. Tovey*, 47 L. J. P. 63; *In b. Willmott*, 6 W. R. 409.

(*c*) *Guest* v. *Willasey*, 12 J. B. Moo. 2, 3 Bing. 614; *In b. Widdrington*, 35 L. J. P. 66.

(*d*) 1 Ad. & Ell. 423, 2 Nev. & M. 821.

(*e*) 3 De G. & S. 475. See also *Allen* v. *Maddock*, 11 Moo. P. C. C. 427, stated, *post*, p. 120.

and a codicil annexed thereto and dated, etc., and described it as a second codicil to his said will : this codicil was duly attested, and it was held by Sir K. Bruce, V.-C., that the first codicil was set up by the second. It could make no difference, he observed, whether the codicil was written on the same paper as the will or not; a codicil was referred to, and there was no dispute what the instrument was.

Where the unattested document is not referred to.

It should seem, however, that where the attested codicil is detached from, and does not refer to, the unattested will or previous codicil, it will not have the effect of curing the defective execution of such prior testamentary document.

Thus, in *In b. Marchant* (*f*), the testatrix left two testamentary documents, the first of which contained directions as to the disposition of her property, and appointed A as executor, but was not executed by her : the second bequeathed all her property to B "for the purposes I require him to do absolutely." This was duly executed as a will. It was held that the first document was not incorporated in the second, but probate was granted to A to administer the property according to the trusts of the first document.

Again, in *Utterton* v. *Robins* (*g*), where a testator, by several unwitnessed memoranda, subsequent to his will, which was duly attested, left a freehold house, which, among other estates, he had acquired since the date of the will, to his daughter, and afterwards made the following codicil, which was duly attested :— "I make this a further codicil to my will, which bears date 12th Sept., 1823; I give and devise all real estates, purchased by me since the execution of my said will, to the trustees therein named, their heirs, etc., to the uses and upon the trusts therein expressed concerning the residue of my real estates"; it was certified on a case from Chancery, that the house passed to the trustees and not to the daughter.

In this case the language of the second codicil seemed to repel the supposition that the testator intended the estates purchased since the execution of the will to pass by the prior codicil; unless, indeed, when he speaks of his "will," he is to be understood (*h*) as referring to all the prior testamentary documents, including the unattested codicil, according to the principle laid down by

(*f*) [1893] P. 254. See below, p. 124, and *post*, p. 885, where the decision is criticised.

(*g*) 1 Ad. & Ell. 423, 2 Nev. & M. 821.

(*h*) Not that he was in fact so understood; the Court showed not obscurely that it thought there was no sufficient reference to the will. Besides, the testator had not purchased any real estate since the execution of his "will" in the wider sense.

CHAPTER VI.

Whether "will" includes a codicil added thereto.

Shadwell, V.-C., in *Gordon* v. *Lord Reay* (*i*), where a testator, by a second codicil (which was duly attested), after reciting his will (which was also duly attested) by date, expressly confirmed all his provisions and bequests in it in favour of a certain individual: and the V.-C. was of opinion that this confirmation had the effect of entitling her to the benefit of a charge created on his freehold estates, by a prior unattested codicil, on the ground that the second codicil amounted to a republication (*k*) of the first. "The first codicil," he said, "is part of the will, and if the second codicil is a republication of the will, it is a republication of everything that is part of the will. The second codicil does refer to the will; it ratifies and confirms the will and everything that is part of it."

Burton v. *Newbery.*

But this decision seems to be erroneous, because, as Jessel, M.R., pointed out (*l*), the second codicil did not refer to the testator's will in general terms: "the only reference," said the M.R., "was to a will bearing date a certain day, that is, as I understand it, to a described instrument, which excludes instruments of subsequent date. . . . It may well be, that where you describe a will generally without date, and say, 'I confirm my will,' you might interpret the word 'will' as including the whole of the testamentary disposition (*m*); but it does appear to me that that was not the case in *Gordon* v. *Lord Reay*." In *Burton* v. *Newbery*, the testator made his will, and then made a codicil which was attested by A and B, who took benefits under the codicil, and afterwards made another codicil "to my last will dated," etc., which was duly attested, but did not refer to the prior codicil (all these instruments being on separate papers), and it was held by the M.R. that the second codicil did not republish the first, and, consequently, that the gifts to A and B under the first codicil failed. But the decision is not relevant to the present discussion (*n*).

Since the statute 1 Vict. c. 26, the point discussed in *Gordon*

(*i*) 5 Sim. 274; see also *Crosbie* v. *Macdoual*, 4 Ves. 610; *Farrer* v. *St. Catherine's College*, L. R. 16 Eq. 19; *Green* v. *Tribe*, 9 Ch. D. 231; referred to *post*, pp. 155 and 185, where the comprehensiveness of the word "will" is considered with reference to the subject of revocation and revival.

(*k*) As to republication, see *post*, pp. 183 *et seq.*

(*l*) In *Burton* v. *Newbery*, 1 Ch. D. 234. *Gordon* v. *Lord Reay* was treated as an authority (together with *Doe* v. *Evans*) by K. Bruce, V. C., in *Aaron* v. *Aaron*. See also *Radburn* v. *Jervis*, 3 Bea. 460.

(*m*) See *Pigott* v. *Wilder*, 26 Bea. 90, where the reference was to the will of another person. See also *Fuller* v. *Hooper*, 2 Ves. 242; *Jauncey* v. *Att.-Gen.*, 3 Giff. 308, where the question was whether "legacies herein mentioned" included legacies given by codicil.

(*n*) The point decided in *Burton* v. *Newbery* (and in the case of *French* v. *Hoey*, [1899] 2 Ir. R. 472) relates more properly to the question of republication, because there was no controversy as to the due execution of the first codicil. See *post*, p. 186.

v. *Lord Reay* can hardly arise, because an unattested paper is not now, as it formerly was, admissible to probate, and cannot properly be regarded as part of the will, or as a codicil to it.

Unattested codicil not included in term "codicil";

If a testator makes several codicils, some of which are, but others are not, duly attested, a subsequent codicil confirming "his will and codicils" confirms only the duly attested codicils. This point was determined in *Croker* v. *Marquis of Hertford* (*o*). Dr. Lushington delivered the judgment of the Privy Council, and said, that "the strict and primary sense of the word 'codicil' was a testamentary instrument which would, *per se*, become valid immediately on the death of the testator; that the words of the codicil in the case before him, when so interpreted, were sensible with reference to extrinsic circumstances; for there were codicils duly executed so as to come within the strict and primary sense; therefore, according to the rule of construction stated by Mr. Wigram (*p*), however capable the words might be of another and popular interpretation, or however strong the intention of the testator, the strict and primary sense must be adhered to." On the same principle, Sir H. J. Fust held (*q*), that codicils not duly attested, though written on the same paper as the will, were not ratified by a codicil of subsequent date which referred only to the will. But, as was implied in the reasons given for those decisions, the case is different where there is no instrument which satisfies the strict meaning of the words of reference. Another rule of construction stated by the same learned writer (*r*) then prevails. For where there is nothing in the context of a will to make it apparent that a testator has used words in any other than their strict and primary sense, but his words, so interpreted, are insensible with reference to extrinsic circumstances, the Court may look into the extrinsic circumstances to see whether the meaning of the words be sensible in any popular or secondary sense, of which with reference to these circumstances they are capable. Accordingly, in *Ingoldby* v. *Ingoldby* (*s*), where there was a paper purporting to be a codicil, and subsequently the testator duly executed a codicil not referring to the paper, except by being called "another codicil to my will," Sir H. J. Fust held that the first paper, purporting to be a codicil, was thereby rendered valid, and he distinguished the case from *Croker* v. *Marquis of Hertford*, on the ground that there were not, as in that case, any duly

—nor in the term "will";

—unless there is no duly attested codicil;

(*o*) 4 Moo. P. C. C. 339, affirming *S. C.* (nom. *Countess Ferraris* v. *Marquis of Hertford*), 3 Curt. 468.
(*p*) Wigram on Wills, p. 17 (5th. ed. p. 18).
(*q*) *Haynes* v. *Hill*, 13 Jur. 1058.
(*r*) Wigram on Wills, Prop. 3.
(*s*) 4 N. of C. 493.

executed codicils to which the last codicil could be held to refer. But it would seem that the commencement of a series of documents with the words "This is a first," "second," "third codicil," would not of itself be sufficient to render valid an intermediate document which is not duly executed or attested (*t*).

—or duly attested will.

In *Allen* v. *Maddock* (*u*), the subject was fully discussed by Lord Kingsdown. In that case a will was made and signed in the presence of one witness only. Afterward the testatrix made a codicil which commenced—"This is a codicil to my last will and testament," and was duly executed. No other will having been found, it was held by the Judicial Committee, upon parol evidence of the circumstances, that the two papers, as together containing the will and codicil, were entitled to probate. From Lord Kingsdown's judgment, it is clear that the question whether an imperfectly executed paper is made effectual by a later perfectly executed one, depends on the question whether the earlier paper is incorporated in the later: in other words, whether the reference be such as, with the assistance (if necessary) of parol evidence of the circumstances, to be sufficient to identify it. Difficulties will of course sometimes arise upon the evidence (*x*); for instance, a reference by a testator to his last will, or to a first or second codicil, is a reference in its own nature to one instrument to the exclusion of all others, and the description identifies the instrument (*y*), but a general reference to codicils, of which there may be several, is different, and probably not easy to render effectual by extrinsic evidence. But where the parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the instrument, it is no objection to the admission of the evidence that by possibility circumstances might have existed in which the instrument referred to could not have been identified. In short, any unattested paper which would have been incorporated in an attested will or codicil executed according to the Statute of Frauds, is now in the same manner incorporated if the will or codicil is executed according to the requirements of the Act of 1 Vict. c. 26, but with this important distinction, that since that Act an unattested codicil is not part of the will for any purpose, and consequently is not incorporated or confirmed by a codicil of subsequent date referring only to the will. The decision in

To supply defect of execution the defective instrument must be incorporated.

(*t*) *Stockil* v. *Punshon*, 6 P. D. 9. See *In b. Heathcote*, *ib.* 30, 32, and *Paton* v. *Ormerod*, [1892] P. 247, where a revoked will was held not to be incorporated by a reference to a settlement; *post*, p. 126.

(*u*) 11 Moo. P. C. C. 427, affirming 3 Jur. (N.S.) 965.

(*x*) See *In b. Allnutt*, 33 L. J. P. 86; *Eyre* v. *Eyre*, [1903] P. 131.

(*y*) *Eyre* v. *Eyre*, [1903] P. 131.

Allen v. *Maddock* (*z*) has been adopted and followed in the case of *In b. Heathcote* (*a*).

The principle being thus the same under both statutes, it follows that, subject to the distinction just noted, the circumstance of the well-executed instrument being written on the same paper as the imperfectly executed one, must still be regarded as materially helping to identify the latter as the document referred to by the former (*b*). And a distinction may fairly be drawn between a case where the later and well-executed instrument contains a reference, more or less particular, to another document, and a case where the later and well-executed instrument contains no express reference to any other; in the latter case the mere circumstance of its being on the same paper with others may possibly furnish ground for implying a reference to all the others, so as to incorporate and set up all. Such appears to have been the case in *Guest* v. *Willasey* (*c*), where the third codicil was thus—"I now appoint A to be my executor in the room of B above mentioned, with full power to act, etc. Witness my hand." So in *In b. Cattrall* (*d*), where, underneath his will, a testator wrote and signed some unattested additions; and under these he afterwards wrote some further additions, which were duly signed and attested; it was held by Sir W. P. Wilde that the presumption was that this signature and attestation were intended to apply, and that they gave effect, to all that went before. But this presumption is rebutted by an express reference of narrower scope. Thus, a reference to the "will" does not set up an unattested writing, though all three are on the same paper, the unattested writing, as we have seen, not being a part of the will (*e*).

In b. Cattrall.

An unexecuted alteration in a will is not rendered valid by a codicil ratifying and confirming the will, unless in such codicil the alteration be specially referred to (*f*), or unless it be proved affirmatively by extrinsic evidence, that the alteration was made before the codicil (*g*); and even then, if it appear to be deliberative only, it will not be included in the probate (*h*).

Unexecuted alterations when rendered valid by subsequent codicil.

(*z*) See 11 Moo. P. C. C. 455, 461; and as to incorporation, *post*, p. 123.

(*a*) 6 P. D. 30.

(*b*) *In b. Terrible*, 1 Sw. & Tr. 140. In *In b. Smith*, 2 Curt. 796, 1 N. of C. 1, and *In b. Claringbull*, 3 N. of C. 1, this circumstance existed; but even without it they are covered by *Allen* v. *Maddock* and *Ingoldby* v. *Ingoldby*, *supra*. See also *Oldroyd* v. *Harvey*, [1907] P. 326, stated in the next chapter.

(*c*) 2 Bing. 429, 3 Bing, 614. (*d*) 33 L. J. P. 106.

(*e*) *In b. Willmott*, 1 Sw. & Tr. 36; *In b. Peach*, *ib.* 138. See also *Haynes* v. *Hill*, 1 Rob. 795; *In b. Phelps*, 6 N. of C. 695; *In b. Hutton*, 5 N. of C. 598; *In b. Spotten*, 5 L. R. Ir. 403.

(*f*) *Lushington* v. *Onslow*, 12 Jur. 465; *In b. Heath*, [1892] P. 253. As to presuming when alterations were made, see Chap. VII, *post*, p. 143.

(*g*) See *per* Sir H. J. Fust, in *Lushington* v. *Onslow*; *In b. Tegg*, 4 N. of C. 531; *In b. Wyatt*, 31 L. J. P. 197. (*h*) *In b. Hall*, L. R. 2 P. & D. 256.

CHAPTER VI.

Conditional codicil.

A codicil which is only to take effect in an event which does not happen, may nevertheless have the effect of setting up an unattested will to which it refers (*i*).

Testator cannot by his will empower himself to dispose by an unattested codicil.

Cases in which there is reference to an existing paper, it is obvious, stand upon quite a different footing from those in which a testator (as often occurred under the old law) attempts to create, by a will duly attested, a power to dispose by a future unattested codicil. To allow such a codicil to become supplementary to the contents of the will itself, would, it is obvious, tend to introduce all the evils against which the Statute of Frauds was directed, and, indeed, give to the will an operation in the testator's lifetime, contrary to the fundamental law of the instrument. Accordingly, where a testator by a will, attested by three witnesses, devised his real estate to trustees, upon trust (subject to certain limitations thereby created) to convey the same to such persons and for such estates as he by deed or will, attested by two witnesses, should appoint; and the testator, professing to exercise this assumed power, executed an instrument attested by two witnesses, which he styled a deed-poll, and thereby carried on the series of limitations commenced in his will: it was decided, after much consideration, that this instrument operated as a codicil to the will, and, consequently, was incapable of affecting the freehold lands, for want of an attestation by three witnesses (*k*).

Stubbs v. *Sargon.* Devisee to be ascertained by future event or act.

In *Stubbs* v. *Sargon* (*l*) it was contended that, on the same principle, a devise of realty to "the persons who shall be in co-partnership with me at the time of my decease, or to whom I shall have disposed of my business," was void, as leaving it for the testator by some further act, not authorised by the Statute of Frauds, to select the devisee. But Lord Langdale, and on appeal Lord Cottenham, held the devise good. Lord Cottenham compared the case to that of a father having two sons, and devising his property to such one of them as should not become entitled to an estate from a third person; here the act of a third

(*i*) *In b. Da Silva*, 30 L. J. P. 171.

(*k*) *Habergham* v. *Vincent*, 2 Ves. jun. 204; 4 Br. C. C. 353; *Rose* v. *Cunynghame*, 12 Ves. 29; *Wilkinson* v. *Adam*, 1 V. & B. 422; *Whytall* v. *Kay*, 2 My. & K. 765; *Countess Ferraris* v. *Marquis of Hertford*, 3 Curt. 468; *Briggs* v. *Penny*, 3 De G. & S. 546; *Johnson* v. *Ball*, 5 De G. & S. 85. See also *Re Boyes*, 26 Ch. D., at p. 535. These cases are to be distinguished from *Smith* v. *Attersoll*, 1 Russ. 266, where the paper was signed by the trustees, and operated as an admission of the trust. As to the admission of parol evidence to prove a trust, see *post*, pp. 472 *et seq.* In *Metham* v. *Duke of Devon*, 1 P. W. 530, a testator directed his executors to pay a sum of money as he should by deed appoint; and subsequently, by a deed referring to the will, he made an appointment, which the Court held to be valid, on the ground that the deed was a part of the will, and in the nature of a codicil. The report does not state whether the deed was admitted to probate, as of course it ought to have been.

(*l*) 2 Keen, 255; 3 My. & C. 507.

person determines who shall take the father's estate. But the act is not testamentary; if it were, one man would be making another man's will. And if not testamentary when done by a third person, it cannot be so when done by the testator himself; otherwise a testator could not devise to such person as, at his death, should be his wife or servant. And Lord Langdale said, if the description was such as to distinguish the devisee from every other person, it was sufficient without entering into the question whether the description was acquired by the devisee after the date of the will, or by the testator's own act in the ordinary course of his affairs, or in the management of his property.

The act must not be testamentary.

The question is, therefore: Is the supplementary act testamentary? If it is, the devise is void; if it is not, then, although it is the sole act of the testator, the devise is good.

The point frequently arises where a testator by his will directs part of his property to be disposed of in such way as he shall by letter, memorandum, etc., or the like, direct; it is clear that no such document can have any testamentary operation, unless executed as a will, or incorporated by a subsequent will or codicil (*m*).

The cases above referred to must be distinguished from those in which the Courts have given a testamentary operation to unattested documents under the doctrine of trusts (*n*).

Reference to extrinsic documents allowable.

XIV.—Incorporation of Non-testamentary Documents.—The rule that a document may be incorporated in a will by reference, is not confined to unattested wills and other documents intended to have a testamentary operation, but extends to any document referred to by a testator in order to elucidate or to explain his intention. The document, if sufficiently identified, is then said to be incorporated in the will. Thus where a person by his will devises all the lands which were conveyed to him by a certain indenture (specifying the deed), or devises lands to the uses declared by a particular indenture of settlement, it is clear that the indentures so referred to may be consulted for this purpose, without violating the principle of the enactment, which requires an attestation by witnesses, the testator's intention to adopt the contents of such instrument being manifested by a will duly

(*m*) See *In b. Lancaster*, 29 L. J. P. 155; *Johnson* v. *Ball*, 5 De G. & S. 85; *In b. Warner*, 10 W. R. 566; *In b. Mathias*, 3 Sw. & Tr. 100; *In b. MacGregor*, 60 L. T. 840; *Scott* v. *Browrigg*, 9 L. R. Ir. 246. See also *Re Thistlethwaite*, 11 T. L. R. 206.

(*n*) See *post*, pp. 885 *seq.* There are also cases (referred to *ante*, p. 95) in which documents written by the testator after the execution of the will are allowed to affect its operation.

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attested (*o*); and it would, it is conceived, be immaterial whether the paper so referred to was in the testator's handwriting, or in that of any other person, and whether it professed to be testamentary or not, as it founds its claim to be received as part of the will, not on its own independent efficacy, but on the fact of its adoption by the attested will.

Requisites for incorporation.

But whatever be the precise nature of the document referred to, it must be clearly identified as the instrument to which the will points (*p*). Two things are necessary: first, that the will should refer to some document as then in existence (*q*); secondly, proof that the document propounded for probate was, in fact, written before the will was made and was identical with that referred to in the will.

1. Will must refer to a document as then existing.

(i) As to the first point, a clause which "ratifies and confirms a deed, dated, etc., and made between, etc.," answers this requirement and incorporates the deed (*r*). But there should be no ambiguity. A reference to a document as "made or to be made" gives strong ground for concluding that the document had not already been made (*s*). So a reference to persons or things "hereinafter named" (*t*), or to "the annexed schedule" (*u*), is not so clear a reference to any document as then existing as to incorporate writings that follow the signature of the testator and of the witnesses, although it be proved that, in fact, such writings were in existence before the will was executed; much less if the evidence on this last point is hesitating (*x*). Again, if a testator attempts to dispose of chattels by referring to them in his will as "articles of personal

(*o*) See *Habergham* v. *Vincent*, 2 Ves. jun. 204; also *Molineux* v. *Molineux*, Cro. Jac. 144.

(*p*) See *Dillon* v. *Harris*, 4 Bligh. (N.S.) 329. Words written below the signature, but before execution, are not incorporated: *In b. White*, [1896] 1 Ir. R. 269.

(*q*) *Van Straubenzee* v. *Monck*, 32 L. J. P. 21; *In b. Sunderland*, L. R. 1 P. & D. 198; *In b. Pascall*, *ib.* 606; *Symes* v. *Appelbe*, 57 L. T. 599; *Re Barber*, [1879] W. N. 141; *Re Phillips' Estate*, 34 T. L. R. 256 (letter incorporated). This requirement was not complied with in *In b. Marchant*, [1893] P. 254.

(*r*) *Sheldon* v. *Sheldon*, 8 Jur. 877; *Bizzey* v. *Flight*, 3 Ch. D. 269. But see *In b. Hubbard*, L. R. 1 P. & D. 53, and *qu.*; but as the deed referred to was valid *per se*, its rejection from the probate seems to have been immaterial.

(*s*) *In b. Skair*, 5 N. of C. 57; *In b. Astell*, *ib.* 489, n. See also *In b. Hakewell*, 1 Deane, 14; and *In b. Countess of Pembroke*, 1 Deane, 182, is perhaps referable to this ground.

(*t*) *In b. Watkins*, L. R. 1 P. & D. 19; *In b. Brewis*, 33 L. J. P. 124; *In b. Dallow*, L. R. 1 P. & D. 189.

(*u*) *Singleton* v. *Tomlinson*, 3 App. Cas. 413, 414, *per* Lord Cairns; *S. C. sub nom. Watson* v. *Arundel*, Ir. R. 11 Eq. 53. Moreover the schedule was not annexed but indorsed (being on the fourth side of a sheet of paper on which the will was written), a discrepancy pointed out by Lord Blackburn, 3 App. Cas. 425. But as to this see *In b. Ash*, 1 Deane, 181.

(*x*) *Supra*, note (*u*).

use, the destination or gift of which may by memoranda or labels thereon be indicated," this is nugatory (*y*). And if the will refers to a document as a future document, and the testator afterwards executes a codicil confirming the will, the document is not thereby incorporated, although it was in fact written before the date of the codicil (*z*). The will must be so worded that, speaking from the date of the codicil, it shall refer to the document as then existing (*a*).

2. The document referred to must be proved to have existed at the date of the will.

(ii) With regard to the evidence necessary to prove that the document propounded for probate was in existence at the date of the will, and that it is the same as that which is referred to therein : if the reference is distinct (*e.g.*, to date, heading, and other particulars), and if the document propounded agrees in these particulars with the description contained in the will, its previous existence and identity will, in the absence of circumstances or evidence tending to a contrary conclusion, be assumed (*b*). Where the reference is less distinct, yet if it be in terms sufficiently definite to render the document capable of identification, extrinsic evidence is admissible, together with such internal evidence as may be found in the document itself, to supply the necessary proof.

Thus, in *Allen* v. *Maddock* (*c*), an unattested will was held to have been incorporated in a duly executed codicil by the heading : "This is a codicil to my last will and testament," no other document having been found to answer to the reference (*d*). And where a document headed "Instructions for the will of J. Wood," disposed of the residue "in such manner as I shall direct by my will to be indorsed hereon," and the testator afterwards made a will, which, though not indorsed on the

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(*y*) *Re Fane*, 2 T. L. R. 510.

(*z*) *In b. Smart*, [1902] P. 238. This was the result arrived at by Gorell Barnes, J., after an examination of the earlier cases, including *In b. Hunt*, 2 Rob. 622; *In b. Truro*, L. R. 1 P. & D. 201; *In b. Rendle*, 68 L. J. P. 125. See also *In b. MacGregor*, 60 L. T. 840; *In b. Mary Reid*, 38 L. J. P. 1; *Durham* v. *Northen*, [1895] P. 66. In *In b. Daniell*, 8 P. D. 14, a codicil, referring only to one gift as being contained in an unattested list not referred to in the will, nor apparently in existence at the date of the will, was held to incorporate the whole list.

(*a*) *In b. Stewart*, 32 L. J. P. 94; *In b. Truro*, L. R. 1 P. & D. 201; *In b. Lancaster*, 29 L. J. P. 155; *In b. Warner*, 10 W. R. 566.

(*b*) *Swete* v. *Pidsley*, 6 N. of C. 189.

(*c*) 11 Moore, P. C. C. 427. See also on the point that the document must be sufficiently identified, *In b. Countess of Durham*, 3 Curt. 57; *In b. Pewtner*, 4 N. of C. 479; *In b. Darby*, *ib.* 427; *Jorden* v. *Jorden*, 2 N. of C. 388; *In b. Dickins*, 3 Curt. 60; *In b. Almosnino*, 1 Sw. & Tr. 508; *In b. Willesford*, 3 Curt. 77; *In b. Bacon*, 3 N. of C. 644; *In b. Mercer*, L. R. 2 P. & D. 91; *In b. Greves*, 1 Sw. & Tr. 250 (where the evidence of identity failed); but see *In b. Edwards*, 6 N. of C. 306; *Collier* v. *Langebear*, 1 N. of C. 369. *In b. Sotheron*, 2 Curt. 831, would not now be followed.

(*d*) See above, p. 120.

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"instructions," was expressed to be made in "pursuance of the instructions for his will," no other instructions being found; it was held that the "instructions" in question were incorporated in the will (*e*). The evidence in the latter case was certainly slight. In *University College of North Wales* v. *Taylor* (*f*), the testator, shortly after executing a will, wrote out a document setting forth his wishes with reference to certain charitable bequests contained in his will; a few months afterwards he made a new will, in which he gave legacies to the same charitable institutions, to be held and applied "upon such terms and conditions and subject to such rules and regulations as are contained and specified in any memorandum amongst my papers written or signed by me relating thereto"; it was held by the Court of Appeal that the document was not sufficiently identified to bring the case within the doctrine laid down in *Allen* v. *Maddock*.

Evidence required.

Probate of unattested papers was refused in *In b. Garnett* (*g*), and *Eyre* v. *Eyre* (*h*) for want of sufficient evidence to identify them. In *Paton* v. *Ormerod* (*i*), a recital in a will that the testatrix had settled certain property was held not to incorporate an old and revoked will by which she had dealt with that property, and evidence that she referred to some other settlement was not admitted.

It is a circumstance frequently relied on that the document propounded for probate was shown to some person before execution of the will, as the paper therein referred to (*k*).

Revocation.

An incorporated document may be revoked by destruction (*l*).

Probate of incorporated documents,

Although an incorporated document is entitled to probate—*i.e.*, to be set out at length in the probate copy—there is no necessity for so proving it in order to bring it within the cognisance of the Court of Construction; for if it is not included in the probate copy, the Court will look at the original document.

—not necessary, to give jurisdiction to the Court of Construction.

Thus, in *Bizzey* v. *Flight* (*m*), A made a voluntary settlement which, as to certain bank shares and mortgages, was incomplete, so that the shares still belonged to A at her death, and she by will "confirmed the settlement, dated, etc.": the settlement was not included in the probate. Hall, V.-C., said: "If a will

(*e*) *Wood* v. *Goodlake*, 1 N. of C. 144. Compare *In b. Pascall*, L. R. 1 P. & D. 606; *In b. Gill*, L. R. 2 P. & D. 6.

(*f*) [1907] P. 228; [1908] P. 140.

(*g*) [1894] P. 90.

(*h*) [1903] P. 131. See also *In b. Kehoe*, 13 L. R. Ir. R. 13.

(*i*) [1892] P. 247.

(*k*) *In b. Smartt*, 4 N. of C. 38; *In b. Bacon*, 3 N. of C. 644.

(*l*) *Re Coyte*, 56 L. T. 510.

(*m*) 3 Ch. D. 269. The trusts that were invalid under the settlement being incorporated in and made part of the will, assumed the testamentary character in all respects, and became subject to ademption, etc.

confirms an instrument which is sufficiently identified, and probate passes leaving in the clause containing the confirmation, the instrument must, I consider, be had regard to as if it were set out in the probate." He held that the effect was as if the testatrix had declared "that the shares specified in the settlement should be held on the following trusts," and had then set out the trusts. So in *Quihampton* v. *Going* (*n*), where a testator referred to certain entries he had made in his ledger, as explaining his will, Jessel, M.R., held that the ledger was incorporated in the will, and, though not admitted to probate, could be looked at by a Court of Construction, and that the entries therein were for the purposes of distribution of the estate conclusive—*i.e.*, the M.R. treated them as part of the will, and not merely as evidence. These cases remove the doubt regarding the competence of the Court of Construction expressed by Dr. Lushington in *Sheldon* v. *Sheldon* (*o*). In *Re Coyte* (*oo*) the testator destroyed the leaves of a book which had been incorporated.

Quihampton v. *Going.*

Two wills.

The question what documents should be included in the probate copy often arises where a testator has made distinct wills, one of property in England, another of property abroad. Generally the former only need be proved here (*p*). But if one refers to or confirms the other in such a way as to incorporate it, both will be included in the probate (*q*).

Omission of incorporated document from probate.

If an incorporated document is very lengthy or cumbrous, the Court of Probate will sometimes allow it to be omitted from the

(*n*) 24 W. R. 917. See also *Singleton* v. *Tomlinson*, 3 App. Cas. 404, where probate had been refused; but this was not relied on.

(*o*) 8 Jur. 877. But as the regular practice of the Court of Probate is to require every paper entitled to probate to be proved, and the original (*In b. Pewtner*, 4 N. of C. 479), or if it cannot be procured, an authenticated copy (*In b. Dickins*, 3 Curt. 60; *In b. Howden*, 43 L. J. P. 26), to be deposited, it is inexpedient to declare trusts of personalty by reference to another instrument. And although where a paper is in the hands of strangers who refuse even to produce it (*In b. Battersbee*, 2 Rob. 439; *In b. Sibthorp*, L. R. 1 P. & D. 106) the rule is wholly dispensed with; and where the paper is of excessive length probate has been granted omitting the whole (*In b. Marquis of Lansdowne*, 32 L. J. P. 121; *In b. Dundas*, 32 L. J. P. 165; *In b. Balme*, [1897] P. 261) or the immaterial parts (*In b. Countess of Limerick*, 2 Rob. 313), showing that the question is one of convenience; yet it appears by the foregoing cases that special application is generally necessary to procure a relaxation of the rule. *In b. Jones*, 123 L. T. 202.

(*oo*) 56 L. T. 510.

(*p*) *In b. Astor*, 1 P. D. 150; *In b. Coode*, L. R. 1 P. & D. 449; *In b. Callaway*, 15 P. D. 147; *In b. De La Rue*, 15 P. D. 185; *In b. Seaman*, [1891] P. 253; *In b. Fraser*, *ib.* 285; *In b. Lockhart*, 69 L. T. 21; *In b. Tamplin*, [1894] P. 39. As to the case of a man making a will confined to property abroad, see *In b. Mann*, [1891] P. 293; *In b. Murray*, [1896] P. 65; *In estate of Paul*, 23 T. L. R. 716.

(*q*) *In b. Harris*, L. R. 2 P. & D. 83; *In b. Howden*, 43 L. J. P. 26; *In b. Western*, 78 L. T. 49; *In b. Green*, 79 L. T. 738; *In b. Todd* [1926] P. 173.

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probate copy, proper provision being made for its custody and production (*r*).

Undisclosed trusts.

The cases where the Court enforces the execution of trusts not appearing on the face of the will or of any document incorporated in it, are considered in another chapter (*s*).

Incorporation of copy of destroyed will.

Although a will which has been revoked by destruction cannot, strictly speaking, be revived by a subsequent codicil (*t*), practically the same effect can be produced by the doctrine of incorporation. Thus in *In b. Lindsay* (*u*), a testator who had destroyed an early will made a codicil in which he referred to its provisions as contained in a draft of it which was before him, in such a way as to show an intention to incorporate them in the codicil.

(*r*) *Sheldon* v. *Sheldon*, 8 Jur. 877, and other cases cited *ante*, p. 124, n. (*r*); *In b. Balme*, [1897] P. 261. Compare *In b. Schenley*, 20 T. L. R. 127.

(*s*) Chap. XXIV, *post*, p. 884.

(*t*) *Post*, p. 180.

(*u*) 8 T. L. R. 507.

CHAPTER VII.

REVOCATION AND ALTERATION OF WILLS.

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I.—By Marriage.—The Wills Act (s. 18) provides, "That every will made by a man or woman shall be revoked by his or her marriage (*a*) (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next-of-kin under the Statute of Distributions)"; and (section 19) that "no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances." Section 18 applies to soldiers' wills (*b*).

Wills revoked by marriage under Wills Act, s. 18.

In the case of wills made after 1925, section 177 of the Law of Property Act, 1925, provides that a will expressed to be made in contemplation of a marriage shall, notwithstanding anything in section 18 of the Wills Act of 1837, or any other statutory

New Law. Will in contemplation of marriage.

(*a*) The marriage must, of course, be a valid marriage, see *Warter* v. *Warter*, 15 P. D. 152. On the effect of the section see *Re Martin*, [1900] P. 228.

(*b*) *Re Wardrop*, [1917] P. 54.

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provision or rule of law to the contrary, not be revoked by the solemnisation of the marriage contemplated.

Exception as to testamentary appointments.

The exception in (*c*) the eighteenth section, of wills made in exercise of a power of appointment, where the property would not in default of appointment pass to the testator's heir, executor, etc., extends to the case of an appointment under a power, where the heir, executor or administrator, or statutory next-of-kin, would not take as such (*d*). Thus, where property was limited in default of appointment to the testator's children, who were his statutory next-of-kin, it was held that a will made by him in exercise of the power was not revoked by subsequent marriage (*e*). And as the words "next-of-kin" alone have a different meaning to "next-of-kin under the Statute of Distributions," a will under a power is not revoked by subsequent marriage where the gift in default of appointment is to the testator's "next-of-kin" (*f*). Where real estate is limited in default of appointment to the donee, his heirs or assigns, marriage will operate to revoke the will (*g*).

Will of foreigner.

If a foreigner makes a will which is valid according to the law of his native country, and afterwards marries in accordance with the law of England, having at that time an English domicil, the marriage revokes the will (*h*). But it seems that section 18 of the Wills Act does not apply to the wills of foreigners domiciled abroad (*i*).

Wills Act, s. 20.

II.—By Burning, Tearing, or Destroying.—The Wills Act provides (section 20) that a will or codicil may be revoked "by the burning, tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction, with the intention of revoking the same" (*k*). Revocation by obliteration forms the subject of a separate section (*l*).

Tearing includes cutting, etc.

Under the Act it has been decided that the word "tearing" includes "cutting" (*m*); for it would be absurd to say that a will torn into two pieces was revoked, but that if cut into twenty

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(*c*) See *Re Paul*, [1921] 2 Ch. 1 for a case not within the exception.

(*d*) The will is revoked as regards all the other dispositions contained in it: *In b. Russell*, 15 P. D. 111.

(*e*) *In b. Fitzroy*, 1 Sw. & T. 133; *In b. Fenwick*, L. R. 1 P. & D. 319; *In b. Worthington*, 20 W. R. 260.

(*f*) *In b. McVicar*, L. R. 1 P. & D. 671; see *In b. Fitzroy, supra; In b. Russell*, 15 P. D. 111.

(*g*) *Vaughan* v. *Vanderstegen*, 2 Drew. 165, 168.

(*h*) *Re Martin*, [1900] P. 211.

(*i*) *Ibid.*, *per* Lindley, L.J.

(*k*) A letter by a soldier on actual military service directing his will to be burnt was held to operate as a revocation: *Re Gossage*, [1921] P. 194.

(*l*) *Post*, p. 143.

(*m*) *Hobbs* v. *Knight*, 1 Curt. 768; *In b. Cooke*, 5 N. of C. 390; and see *Clarke* v. *Scripps*, 16 Jur. 783.

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When partial tearing effects total revocation.

pieces it was not revoked. The tearing or cutting, to be effectual, need not be of the whole will; tearing or cutting out that part of the will which may be said to be the principal part (*n*), or that part which gives effect to the whole, as the signature of the testator (*o*), or, probably, of the witnesses (*p*), will cause a revocation of the whole will, but the presumption of revocation thus arising may be rebutted (*q*). So also where the signatures of a testatrix and of the witnesses were scratched out as with a pen-knife, the will was held to have been effectually revoked (*r*). And where the will is written on several sheets, each signed and witnessed, tearing off the last signature will revoke the whole will, although the prior signatures are left (*s*). It has also been decided by the Court of Exchequer (*t*) that tearing off, *animo revocandi*, the seal of a will (though no seal is necessary to the due execution of a will) constituted a revocation. They said that the instrument purported by the attestation clause to be executed under seal, and was published and attested as a sealed instrument, and when the seal was torn off it ceased to be the instrument which the testator purposed to execute and publish. And this authority was followed by Wood, V.-C., in a case (*u*) where a testator made his will on five sheets of paper, signed the first four, and signed and sealed the fifth, with an attestation clause describing the mode of execution; he afterwards tore off the signature from each of the first four sheets and struck through with his pen the signature on the last, and, the *animus revocandi* being proved in evidence, it was held that the will was revoked by the tearing (*x*). But in *Clarke* v. *Scripps* (*y*),

(*n*) *Williams* v. *Jones*, 7 N. of C. 106.

(*o*) *Hobbs* v. *Knight*, 1 Curt. 768; *In b. Gullan*, 27 L. J. P. 15; *In b. Lewis*, *ib.* 31; *In b. Simpson*, 5 Jur. (N.S.) 1366; *Bell* v. *Fothergill*, L. R. 2 P. & D. 148. In the last two cases the piece cut off had been preserved with the will. In *In b. White*, 3 L. R. Ir. 413, the portion torn off was all that remained. In *In b. Simpson*, *supra*, and in *Magnesi* (or *Maynes*) v. *Hazelton*, 44 L. T. 586, both pieces were preserved. See *North* v. *North*, 25 T. L. R. 322.

(*p*) *Evans* v. *Dallow*, 31 L. J. P. 128. See also *Birkhead* v. *Bowdoin*, 2 N. of C. 66; *Hobbs* v. *Knight*, 1 Curt. 780, 781; *Abraham* v. *Joseph*, 5 Jur. (N.S.) 179. See *In b. James*, 7 Jur. (N.S.) 52.

(*q*) *In b. Wheeler*, 49 L. J. P. 29; *In b. Taylor*, 63 L. T. 230.

(*r*) *In b. Morton*, 12 P. D. 141. A partial obliteration of the signatures would not be a revocation: *In b. Godfrey*, 69 L. T. 22. Lord St. Leonards has expressed the opinion that a will written in pencil would be revoked by erasing the signature by india-rubber, Handy Book (8th ed.), p. 250, *sed qu.* As to the meaning of "erase" see *Wilkinson* v. *Schneider*, L. R. 9 Eq. 423, *post*, p. 180.

(*s*) *In b. Gullan*, 27 L. J. P. 15; *Gullan* v. *Grove*, 26 Bea. 64. Compare *Christmas* v. *Whinyates*, 32 L. J. P. 73 (where the Court was satisfied that the tearing was intended to work a partial revocation only).

(*t*) *Price* v. *Powell*, 3 H. & N. 341. See also *Davies* v. *Davies*, 1 Lee Eccl. 444.

(*u*) *Williams* v. *Tyley*, Johns. 530.

(*x*) See the case of *Leonard* v. *Leonard*, below, p. 134, and *In b. White*, 3 L. R. Ir. 413, *supra*, note (*o*).

(*y*) 2 Rob. 563.

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where the testator had cut off his signature from the first six pages of his will, leaving his signature with the attestation clause and signatures of the witnesses, on the last sheet, it was held that the will was not revoked.

Revocation *pro tanto.*

Cutting out a particular clause, or the name of a legatee, is a revocation *pro tanto* only (*z*).

Meaning of words "otherwise destroying."

The words "otherwise destroying" are to be taken to mean a destruction *ejusdem generis* with the modes before mentioned; that is, destruction, in the proper sense of the word, of the substance or contents of the will, or, at least, complete effacement of the writing, as by pasting over it a blank paper (*a*); and not a "destroying" in a secondary sense (*b*), as by cancelling or incomplete obliteration.

Partial revocation.

Part of a will may be revoked by destruction. Thus, if a testator cuts out the name of a legatee or executor wherever it appears in the will, this is a good partial revocation, and the will is entitled to probate in its mutilated state (*c*).

In *Re Coyte* (*d*), the destruction of a document referred to in the will was held to be a revocation not only of the document itself, but also of the clause in the will referring to it.

Destruction by third person.

Destruction by a person other than the testator, in order to operate as a revocation, must be both in the presence and by the direction of the testator (*e*); and therefore a testator cannot revoke his will by authorising any person to destroy it after his death (*f*); and if in such case the will should be destroyed its contents might be proved *aliunde* (*g*).

Evidence of *animus* admitted.

(a) *Animus revocandi.*—Revocation by destruction is in every case a question of intention, and accordingly evidence is admissible to show *quo animo* the act was done, which is a conclusion to be drawn by a Court or jury from all the circumstances. The mere physical act of destruction is itself equivocal, and may be deprived of all revoking efficacy by explanatory evidence, indicating the *animus revocandi* to be wanting. Thus, if a

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(*z*) *In b. Cooke*, 5 N. of C. 390; *In b. Lambert*, 1 N. of C. 131; *In b. Nelson*, Ir. R. 6 Eq. 569; *In b. Woodward*, L. R. 2 P. & D. 206, where seven or eight lines at the beginning had been cut off; *In b. Maley*, 12 P. D. 134, where the clause appointing executors had been cut out. See also *In b. Leach*, 63 L. T. 111.

(*a*) *In b. Horsford*, L. R. 3 P. & D. 211, *S.C. sub nom. Ffinch* v. *Combe*, [1894] P. 191.

(*b*) *Stephens* v. *Taprell*, 2 Curt. 458; *Hobbs* v. *Knight*, 1 Curt. 779.

(*c*) *In b. Leach*, 63 L. T. 111; *In b. Taylor*, *ib.* 230.

(*d*) 56 L. T. 510.

(*e*) *Margary* v. *Robinson*, 12 P. D. 12; *In b. Dadds*, Deane, 290; *Clark* v. *Dixon*, 8 T. L. R. 11; *Gill* v. *Gill*, 25 T. L. R. 400.

(*f*) *Stockwell* v. *Ritherdon*, 12 Jur. 779.

(*g*) *In b. North*, 6 Jur. 564.

testator destroys his will through inadvertence (*h*), or during a fit of insanity (*i*), or drunkenness (*k*), or tears it up under the mistaken impression that it is invalid (*l*), or useless (*m*), or that it has been already by other means effectually revoked (*n*), it will remain in full force, notwithstanding such accidental or involuntary or mistaken act. So, the destruction of the instrument by a third person in the lifetime, but without the permission or knowledge, of the testator, would not affect its validity (*o*); *a fortiori*, if the destruction took place after his decease (*p*). Where a will is found torn after the death of the testator, and there is no direct evidence of intention, the question whether it was torn by him *animo revocandi* often depends on the appearance of the paper and other circumstances; the presumption seems to be that the tearing was done by him *animo revocandi* (*q*), but evidence is admissible to show that it is merely the effect of wear (*r*); for mere tearing or destruction, without intention to revoke, is no revocation, under the express terms of the Act (*s*). Similarly, where a testator made a will which was revoked by his subsequent marriage but revived by a codicil made after the marriage, it was held that his destruction of the codicil did not render the will inoperative, the Court being satisfied on the

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(*h*) *Per* Lord Mansfield, *Burtonshaw* v. *Gilbert*, Cowp. 62. So where a revocation *pro tanto* by cutting out part of the will was intended, and part of the attestation had been apparently cut out by mistake; see *In b. Taylor*, 63 L. T. 230.

(*i*) *Scruby* v. *Fordham*, 1 Ad. 74; *Borlase* v. *Borlase*, 4 N. of C. 139; *In b. Shaw*, 1 Curt. 905; *In b. Downer*, 18 Jur. 66; *Brunt* v. *Brunt*, L. R., 3 P. & D. 37; *In b. Hine*, [1893] P. 282. Where a testator becomes insane after the execution of his will, which is found to have been destroyed, the burden of proof that he destroyed it while he was of sound mind is cast on the person who sets up the revocation of the instrument: *Harris* v. *Berrall*, 1 Sw. & Tr. 153. Compare *Sprigge* v. *Sprigge*, *post*, p. 140.

(*k*) *In b. Brassington*, [1902] P. 1.

(*l*) *Giles* v. *Warren*, L. R. 2 P. & D. 401; *In b. Thornton*, 14 P. D. 82; *In b. Mackenzie*, [1909] P. 306.

(*m*) *Beardsley* v. *Lacey*, 78 L. T. 25. In *James* v. *Shrimpton* (1 P. D. 431) the testator made a will, married, and then executed a codicil reviving his will, and containing provisions for the benefit of his wife, who predeceased him. On his death the codicil could not be found, and it was therefore presumed to have been destroyed by the testator under a mistaken belief that it was useless: the will and codicil were therefore admitted to probate. As to the case of *Stamford* v. *White*, [1901] P. 46, see the chapter on the Powers of Appointment.

(*n*) *Scott* v. *Scott*, 1 Sw. & Tr. 258; *Clarkson* v. *Clarkson*, 31 L. J. P. 143.

(*o*) Where a will has been torn up without the testator's authority, he cannot by any subsequent ratification of the destruction render the act a valid revocation of the will: *Gill* v. *Gill*, [1909] P. 157; *Millward* v. *Millward*, 15 P. D. 20. See also *Re Booth*, [1926] P. 118 (will accidentally burnt).

(*p*) *Haines* v. *Haines*, 2 Vern. 441.

(*q*) *Hare* v. *Nasmyth*, 3 Hagg. 192, n.; *Lambell* v. *Lambell*, *ib.* 568; *Williams* v. *Jones*, 7 N. of C. 106; *In b. Lewis*, 27 L. J. P. 31. The presumption may be rebutted: *In b. Mackenzie*, [1909] P. 366; *In b. Templemore*, 69 Sol. J. 382.

(*r*) *Bigge* v. *Bigge*, 9 Jur. 192, and see 1 Eq. Cas. Abr. 402, pl. 3 marg.

(*s*) *In b. Tozer*, 7 Jur. 134; *In b. Hannam*, 14 Jur. 558; *Clarke* v. *Scripps*, 16 Jur. 783.

evidence that there was no intention to revoke the will, but that the testator had acted under a misconception as to the effect of his act (*t*).

So, if a will is destroyed with the intention of making a fair copy of it, this will not effect a revocation (*u*).

A revocation grounded on an assumption of fact which is false takes effect unless, as a matter of construction, the truth of the fact is the condition of revocation, or in other words, unless the revocation is contingent on the fact being true (*x*).

Can there be revocation without *animus*?

Where a testator destroys part of his will, the mere fact that what remains is thereby made incomplete or difficult to understand, does not show that he intended to revoke the whole will (*y*); but where he destroys a substantial part of his will, intending to substitute other provisions, and the substitution is not effectually made, the question arises whether the remaining part of the will is revoked, on the principle that the testator only intended it to remain in force if the substituted provisions took effect. Thus in *Treloar* v. *Lean* (*z*), the testator destroyed three of the middle sheets of his will, and substituted three new ones, which were signed by him but not attested : the Court pronounced against the will with the consent of all parties. In *Leonard* v. *Leonard* (*a*) the testator destroyed the first two sheets of his will and substituted two others, each of which was signed by him and the persons who had witnessed the execution of the will, and the document as thus constituted was a complete testamentary disposition. It was held by Gorell Barnes, J., that the destruction of the two sheets operated as a revocation of the whole will, and that the interpolated sheets were not executed in accordance with the statute. The result was an intestacy. It may be observed that the learned Judge's answer to the argument, that the new sheets constituted an "alteration" within the meaning of the Wills Act, is not quite conclusive; alteration and total destruction are two different things (*b*). It is also submitted that the cases of *Clarke* v. *Scripps* and *In b. Woodward*, on which the learned Judge relied, do not support the decision, and that it is inconsistent with the doctrine laid down by Butt, J., in *Gardiner* v. *Courthope* (*c*).

(*t*) *James* v. *Shrimpton*, 1 P. D. 431.

(*u*) *In b. Tozer*, 7 Jur. 134; *In b. Kennett*, 2 N. R. 461; *In b. Appelbee*, 1 Hagg. 143.

(*x*) *Re Faris*, [1911] 1 Ir. R. 464. See *Re Southerden*, [1925] P. 177, at p. 182, where a testator burnt his will under the mistaken belief that if he died intestate his widow would be entitled to the whole of the property.

(*y*) *Clarke* v. *Scripps*, 2 Rob. 563; *In b. Woodward*, L. R. 2 P. & D. 206.

(*z*) 14 P. D. 49.

(*a*) [1902] P. 243.

(*b*) The case is referred to below, p. 145.

(*c*) 12 P. D. 14.

Declarations of intention.

Declarations made by the testator are admissible as evidence of his intention (*d*), those made at the time of the act of destruction being of course of greater weight than those made subsequently (*e*).

Insanity.

If a testator becomes insane after making his will, and it is subsequently found to have been torn or mutilated, the burden of proving that the injury was done by the testator while of sound mind rests upon the party setting up revocation (*f*).

Effect where destruction is connected with a new disposition.

(b) *Dependent relative revocation.*—Where the act of destruction is connected with the making of another will, so as fairly to raise the inference that the testator meant the revocacation of the old to depend upon the efficacy of the new disposition intended to be substituted, such will be the legal effect of the transaction; and therefore, if the will intended to be substituted is inoperative from defect of attestation, or any other cause, the revocation fails also, and the original will remains in force (*g*). In one case a testator, having some time before executed a will, duly attested, to each sheet of which he had affixed a seal, instructed his solicitor to prepare another, and signed the draft prepared from those instructions, and then proceeded to tear off the seals of the old will; after all the seals but one had been thus removed, he was informed that the new will would not be operative upon his lands, in its then state, which induced him to desist; and before the new will was complete, the testator died : it was held, that the original will remained unrevoked (*h*).

Will destroyed to make new will.

A fortiori, where it appears from the evidence that the will is destroyed for the purpose of substituting a fresh will, the old will is not revoked, if the new one be in fact not made (*i*).

Intention to revive revoked will.

The same rule generally applies where the later of two inconsistent wills is destroyed on the supposition that the earlier will is thereby revived; for if this supposition be (as by the existing law we shall presently see it is) erroneous, the later will remains unrevoked. In this case the act of destruction is referable, not to any absolute intention to revoke, but to an intention to validate another paper; and as the assumption that the revoca-

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(*d*) *Keen v. Keen*, L. R. 3 P. & D. 105.

(*e*) *Powell* v. *Powell*, L. R. 1 P. & D. 209; *In b. Weston*, *ib.* 633.

(*f*) *Harris* v. *Berrall*, 1 Sw. & Tr. 153.

(*g*) *In b. Middleton*, 10 Jur. (N.S.) 1109; *In b. Irvin*, 25 T. L. R. 41; *West* v. *West*, [1921] 2 Ir. R. 34; *Re Bunn*, 134 L. T. 669.

(*h*) *Hyde* v. *Hyde*, 1 Eq. Ab. 409; *Eggleston* v. *Speke*, 3 Mod. 258; *Ex p. Ilchester*, 7 Ves. 348; *Onions* v. *Tyrer*, 1 P. W. 343; *Burtonshaw* v. *Gilbert*, Cowp. 49; *Sutton* v. *Sutton*, Cowp. 812; *Winsor* v. *Pratt*, 5 J. B. Moo. 484; *Perrott* v. *Perrott*, 14 East, 440; *Dancer* v. *Crabb*, L. R. 3 P. & D. 98. See also *Jenner* v. *Ffinch*, 5 P. D. 106; *Re Fleetwood*, 15 Ch. D. 594, 609.

(*i*) *Dancer* v. *Crabb*, L. R. 3 P. & D. 98, 104; see *In b. De Bode*, 5 N. of C. 189; *In b. Eeles*, 2 Sw. & Tr. 600; *Dixon* v. *Solicitor to the Treasury*, [1905] P. 42; *In b. Irvin*, 25 T. L. R. 41.

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tion will have that operation is erroneous, no true *animus revocandi* is considered to exist (*k*).

When the testator's intention would be defeated by restoring the original words the Court is not bound to apply the doctrine of dependent relative revocation, and may hold that the original words were revoked, although the other words were ineffectually substituted (*l*).

But the mere intention to make at some indefinite future time a new will, is not enough to prevent revocation (*m*).

Revocation by partial destruction.

(c) *Incomplete Destruction.*—It has been seen that the act of destruction, without the intention to revoke, is ineffectual (*n*). Where, however, there is an intention on the part of the testator to destroy the will, but the act is not completed, the authorities present more matter for consideration (*o*).

The early case of *Bibb* d. *Mole* v. *Thomas* (*p*) has generally been considered to establish that a very slight act of tearing is sufficient to effect a revocation, if done with such intention; the facts were as follows : The testator (who had frequently declared himself dissatisfied with his will), being one day in bed near the fire, ordered W, a person who attended him, to fetch his will, which she did, and delivered it to him, it being then whole, only somewhat creased; he opened and looked at it, then gave it a rip with his hands, so as almost to tear a bit off, then rumpled it together, and threw it on the fire; but it fell off. However, it must soon have been burnt, had not W taken it up, and put it into her pocket. The testator did not see her do so, but, afterwards, upon his repeated inquiries, she falsely told him that she had destroyed it. The testator afterwards told a person that he had destroyed his will, and should make no other until he had seen his brother, to whom he wrote to the same effect, and desired him to come down, saying, "If I die intestate, it will cause uneasiness." The testator, however, died without making another will. The jury thought this a sufficient revocation, and the Court of C. P. was of the same opinion, on a motion for a new trial; De Grey, C.J., observing that this case fell within two of the specific acts described by the Statute of Frauds; it was

(*k*) *Powell* v. *Powell*, L. R. 1 P. & D. 209, overruling *Dickinson* v. *Swatman*, 30 L. J. P. 84. See also *Eckersley* v. *Platt*, L. R. 1 P. & D. 281; *In b. Weston*, L. R. 1 P. & D. 633; *In b. Andrews*, [1893] P. 14; *Cossey* v. *Cossey*, 69 L. J. P. 17; *Welch* v. *Gardner*, 51 J. P. 760.

(*l*) In *Re Zimmer*, 40 T. L. R. 502.

(*m*) *Williams* v. *Tyley*, John. 530; *In b. Mitcheson*, 32 L. J. P. 202; *North* v. *North*, 25 T. L. R. 322.

(*n*) *Ante*, p. 132.

(*o*) It will be remembered that destroying the principal or essential part of a will may cause a revocation of the whole : *ante*, p. 131.

(*p*) 2 W. Bl. 1043.

both a burning and a tearing; and that throwing it on the fire, with an intent to burn, though it was only very slightly singed and fell off, was sufficient within the statute.

Mere attempt to destroy is not necessarily revocation.

It is not, however, to be inferred from this case that the mere intention, or even attempt, of a testator to burn, tear, or destroy his will, is sufficient to produce revocation, within the meaning of the Statute of Frauds, or the Wills Act; for, the legislature having pointed out certain modes by which a will may be revoked, it is not in the power of the judicature, under any circumstances, to dispense with part of its requisitions, and accept the mere intention or endeavour to perform the prescribed act, as a substitute or equivalent for the act itself, though the intention or endeavour may have been frustrated by the improper behaviour of a third person.

Thus, in the case of *Doe* d. *Reed* v. *Harris* (*q*), it appeared by the evidence of the testator's servant, that the testator had thrown the will on the fire, from which it was immediately snatched by a relative who lived with them, when the fire had merely singed the cover. The testator afterwards insisted upon her giving up the will to be burnt, which she promised to do; and, in order to satisfy the testator, threw something into the fire, which was not the will (as she represented it to be), of which the testator appears to have had some suspicion, for, upon the witness expressing her doubt whether the will had been destroyed, the testator said, "I do not care, I will go to L, if I am alive and well, and make another will." The Court of Q. B. held, that the will was not revoked, on the ground that there had been no actual burning of the instrument. "It is impossible," said Lord Denman, "to say that singeing a cover is burning a will within the meaning of the statute." Patteson, J., said, "To hold that it was so, would be saying that a strong intention to burn was a burning. There must be, at all events, a partial burning of the instrument itself; I do not say that a quantity of words must be burnt; but there must be a burning of the paper on which the will is."

Effect where a testator suspends the destroying act before its completion.

It is also clear, that if a testator is arrested in his design of destroying the will, by the remonstrance or interference of a third person, or by his own voluntary change of purpose, and thus leaves unfinished the work of destruction which he had commenced, the will is unrevoked; and the degree in which the attempt had been accomplished, would not, it should seem, be very closely scrutinised, if the testator himself had put his own

(*q*) 6 Ad. & Ell. 209. See *Cheese* v. *Lovejoy*, 2 P. D. 251; *Andrew* v. *Motley*, 12 C. B. (N.S.) 514.

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construction upon his somewhat equivocal act, by subsequently treating the will as undestroyed.

Thus, in *Doe* v. *Perkes* (*r*), where a testator, upon a sudden provocation by one of the devisees, tore his will asunder; and, after being appeased, fitted the pieces together, and expressed his satisfaction that it was no worse, and that no material injury had been done; it was held that the will remained unrevoked. Here (to use the language of a distinguished Judge) (*s*) the intention of revoking was itself revoked, before the act was complete. And in *Elms* v. *Elms* (*t*), the testator had torn his will nearly through, but the evidence seemed to show that he intended to do more, and was stopped by the remonstrance of a person present, and it was held that the will was not revoked (*u*). When a will is found in the possession of the testator partially torn the presumption of law is that the tearing was done by the testator, but the burden of proof that this was done *animo revocando* is on the party alleging the revocation (*x*).

As to partial revocation by destruction, see above, p. 132.

Effect of destroying one part of duplicate will.

(d) *Destruction of Duplicate Will.*—Sometimes a testator for greater security executes his will in duplicate, retaining one part and committing the other to the custody of another person (usually an executor or trustee); and questions have not unfrequently arisen as to the effect of his subsequently destroying one of such papers, leaving the duplicate entire. In these cases the presumption generally is, that the testator means by the destruction of one part to revoke the will, but the strength of the presumption depends much upon circumstances. Thus, where (*y*) he cancels that part which is in his own possession (the duplicate being in the custody of another), it is very strongly to be presumed that he does not intend the duplicate to stand, he having destroyed all that was within his reach (*z*). So, if the

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(*r*) 3 B. & Ald. 489; and compare *In b. Colberg*, 2 Curt. 832.

(*s*) Vide 6 Ad. & Ell. 215.

(*t*) 27 L. J. P. 96. And see *In b. Cockayne*, 2 Jur. (N.S.) 454.

(*u*) "It occurs to remark," says Mr. Jarman, "that testators should be dissuaded from making or altering their wills (as they are often disposed to do), under the influence of any temporary excitement occasioned by the ill-conduct of a legatee; and, still more, from recording their resentment in their wills, which may have the effect of wounding the feelings of, and casting a stigma on, the offending party long after the transaction which gave occasion to the irritation has been effaced from recollection or is remembered only to be regretted." The Probate Court will not readily omit from the probate any such record of displeasure: *In b. Honywood*, L. R., 2 P. & D. 251.

(*x*) *Re A. C. Cowling*, [1924] P. 113.

(*y*) See *Sir Edward Seymour's Case*, cited Comyns, 453; *Onions* v. *Tyrer*, 1 P. W. 346; and see *Colvin* v. *Fraser*, 2 Hagg. 266; *Rickards* v. *Mumford*, 2 Phillim. 23.

(*z*) *Burtonshaw* v. *Gilbert*, Cowp. 49; *Boughey* v. *Moreton*, 3 Hagg. 191, n.; *Jones* v. *Harding*, 58 L. T. 60; *Paige* v. *Brooks*, 75 L. T. 455.

testator have himself possession of both, the presumption of revocation holds, though weaker (*a*), and even if, having both in his possession, he alters one, and then destroys that which he had altered, there is also the presumption, but weaker still.

These several gradations of presumption were stated by Lord Erskine in *Pemberton* v. *Pemberton* (*b*), the circumstances of which were as follows: Two parts of a will were found in the possession of a testator at his death, the one cancelled, having various alterations in it, and the other not altered or cancelled; and the finding of the jury in three successive trials at law on these facts, and the evidence generally, was that the will was not revoked; and in that conclusion the L. C. finally concurred.

Perhaps, in such a case, the presumption can hardly be said to lean in favour of the revocation at all; for the testator having made alterations in one part, and then cancelled the part so altered only, the conclusion would rather seem to be, that he merely intended, by the destruction of that part, to get rid of the alterations, and to restore the will to its original state. And it is observable, that, in *Roberts* v. *Round* (*c*), where one of two duplicate wills was found partly mutilated, and the other carefully preserved, in the testator's own possession, it was held, that the will remained unrevoked.

The evidence in *Pemberton* v. *Pemberton*, as to the intent with which the act of cancellation was done, consisted partly of subsequent declarations of the testator, and these tended rather to favour the revocation than otherwise; but both Lord Eldon and Lord Erskine adverted to the very little weight due to expressions thrown out by testators in conversation with persons respecting their wills.

Declarations made by a testator after the date of his will are not admissible to prove that it was executed in duplicate (*d*).

Presumption as to destruction of wills.

(e) *Lost Wills.*—If a will is traced into the testator's possession, and is not found at his death, the presumption is that he destroyed it for the purpose of revoking it (*e*); but the presumption may be rebutted, and it will be more or less strong according to the character of the custody which the testator had

(*a*) *In b. Hains*, 5 N. of C. 621.
(*b*) 13 Ves. 310.
(*c*) 3 Hagg. 548.
(*d*) *Atkinson* v. *Morris*, [1897] P. 40.
(*e*) So if a will is written on several sheets, and only some of them are found after his death, it is generally to be presumed that he destroyed the others with the intention of revoking them: *In b. Gullan*, 27 L. J. P. 15. Whether this revokes the whole will is another question: see *ante*, p. 131. For the circumstances in which the Court will grant Probate of a lost will see *Re Spain*, 31 T. L. R. 435.

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over the will (*f*). It is difficult to lay down any general rule as to the nature of the evidence which is required to rebut the presumption of destruction; it depends to a considerable extent on the testator's property and his relations towards his family. Where the will makes a careful and detailed disposition of the testator's property, and nothing happens to make it probable that he wishes to revoke it, the presumption raised by the disappearance of the will may be rebutted by slight evidence, especially if it is shown that access to the box, or other place of deposit where the will was kept, could be obtained by persons whose interest it is to defeat the will. In fact, it may almost be said that in such a case the presumption is the other way, namely, that the testator did not intend to die intestate (*g*). Declarations made by the testator are admissible, not as evidence as to the fact of destruction, but as evidence of intention either to revoke or to adhere to the will (*h*).

Insanity.

The ordinary presumption does not apply to the case of a testator who becomes insane after the execution of the will, and continues insane until his death : in such a case the burden of showing that the will was destroyed while the testator was of sound mind lies on the party setting up the revocation (*i*).

Custody of will.

If the will is traced out of the testator's custody, it is incumbent on the party setting up the revocation to prove that the will came again into the testator's custody, or was destroyed by his directions (*k*).

What evidence is sufficient to prove execution of will.

In *Flood* v. *Russell* (*l*), there was no direct evidence of the execution of the alleged will, but the fact of its execution and its contents were proved by oral evidence.

Secondary evidence of contents.

(f) *Secondary evidence of Contents of Lost or Destroyed Will.*—Where a will has been lost or destroyed, and the presumption

(*f*) *Per* Cockburn, C.J., in *Sugden* v. *Lord St. Leonards*, 1 P. D. at p. 217; *Allan* v. *Morrison*, [1900] A. C. 604; *Paige* v. *Brooks*, 75 L. T. 455; *In b. Debac*, 77 L. T. 374. The earlier cases are *Davis* v. *Davis*, 2 Ad. 223; *Patten* v. *Paulton*, 4 Jur. (N.S.) 341; *In b. Brown*, 4 Jur. (N.S.) 244; *Lillie* v. *Lillie*, 3 Hagg. 184; *Wargent* v. *Hollings*, 4 Hagg. 245; *Tagart* v. *Squire*, 1 Curt. 289; *Welch* v. *Phillips*, 1 Moo. P. C. C. 299; *Brown* v. *Brown*, 8 Ell. & Bl. 876; *In b. Shaw*, 1 Sw. & Tr. 62.

(*g*) *Sugden* v. *Lord St. Leonards*, 1 P. D. 154; see especially pp. 214-5; *Finch* v. *Finch*, L. R. 1 P. & D. 371. Other cases are *Saunders* v. *Saunders*, 6 N. of C. 518; *Battyl* v. *Lyles*, 4 Jur. (N.S.) 718; *In b. Gardner*, 27 L. J. P. 55; *In b. Ripley*, 4 Jur. (N.S.) 342; *In b. Simpson*, 5 Jur. (N.S.) 1366; *In b. Pechell*, 6 Jur. (N.S.) 406; *Eckersley* v. *Platt*, L. R. 1 P. & D. 281; *In b. Berry*, 65 L. T. 763.

(*h*) *Whiteley* v. *King*, 17 C. B. (N.S.) 756; *Keen* v. *Keen*, L. R. 3 P. & D. 105; *Sugden* v. *Lord St. Leonards*, *supra*; *Re Sykes*, *Drake* v. *Sykes*, 22 T. L. R. 741, 23 T. L. R. 747; *In b. Mitcheson*, 32 L. J. P. 202.

(*i*) *Sprigge* v. *Sprigge*, L. R. 1 P. & D. 608; *In b. Crandon*, 84 L. T. 330.

(*k*) *Colvin* v. *Fraser*, 2 Hagg. 327; and see *Wynn* v. *Heveningham*, 1 Coll. 638, 639; and *Estate of Birkby*, 73 Sol. J. 256.

(*l*) 29 L. R Ir. 91.

of destruction *animo revocandi* is rebutted, or does not arise, the contents of the will may be proved by secondary evidence, such as a draft of copy, or oral testimony (*m*); and it seems that the oral testimony of a single witness who takes an interest under the alleged will is sufficient (*n*). Declarations, written or oral, made by the testator before the execution of the will, are admissible as secondary evidence of its contents (*o*). In some cases post-testamentary declarations by the testator as to his will have been admitted as evidence of its contents (*p*), but their admissibility seems doubtful (*q*).

Probate of part of will.

It was laid down in *Sugden* v. *Lord St. Leonards* that it is not necessary that the whole of the contents of a lost or destroyed will should be proved, provided the Court is satisfied that the substantial parts have been proved. But the language of some of the judgments in that case goes beyond the principles laid down in other cases. For example, it seems clear that it is not sufficient to prove the residuary clause in the alleged will, at all events if there is reason to suppose that important legacies were also given by it (*r*).

Consent of persons interested.

Where the property is small, the Court of Probate sometimes allows the contents of a lost will to be proved, without requiring the consent of all persons interested (*s*).

In *Barkwell* v. *Barkwell* (*t*) evidence was admitted that a lost will (which presumably had been destroyed by the testator) contained a revocation clause.

Effect of testator destroying will, and leaving codicil undestroyed.

III.—Whether a Codicil is revoked by Destruction of Will.—Sometimes there is found, among the papers of a testator, a codicil without the will of which it professes to be part; in such cases the question arises, whether or not the destruction of the

(*m*) See the cases above cited; also *Clarkson* v. *Clarkson*, 31 L. J. P. 143; *Podmore* v. *Whatton*, 33 L. J. P. 143; *In b. Barber*, L. R. 1 P. & D. 267; *Burls* v. *Burls*, L. R. 1 P. & D. 472; *James* v. *Shrimpton*, 1 P. D. 431; *Harris* v. *Knight*, 15 P. D. 170; *In b. Leigh*, [1892] P. 82; *Flood* v. *Russell*, 29 L. R. Ir. R. 91; *Re Spain*, 31 T. L. R. 435; *Lafone* v. *Griffin*, 25 T. L. R. 308. In *Gill* v. *Gill*, [1909] P. 157, a small piece of the will was torn off without the testator's authority and was missing; its contents were proved by oral evidence. The missing words were not inserted in the probate, but in an annexed document.

(*n*) *Sugden* v. *Lord St. Leonards*, 1 P. D. 154. In that case the oral evidence was corroborated by codicils and other documents.

(*o*) See *Sugden* v. *Lord St. Leonards*, *supra*, and the cases there referred to, especially *Quick* v. *Quick*, 3 Sw. & Tr. 442; *Johnson* v. *Lyford*, L. R. 1 P. & D. 546.

(*p*) *Sugden* v. *Lord St. Leonards*, *supra*; *Gould* v. *Lakes*, 6 P. D. 1.

(*q*) *Woodward* v. *Goulstone*, 11 A. C. 469; *Atkinson* v. *Morris*, [1897] P. 40.

(*r*) *Woodward* v. *Goulstone*, 11 A. C. 469. Compare *Dickinson* v. *Stidolph*, 11 C. B. (N.S.) 341.

(*s*) *In b. Apted*, [1899] P. 272; *In b. Brassington*, [1902] P. 1.

(*t*) [1928] P. 91.

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will (which it is to be presumed, in the absence of proof to the contrary, was the act of the testator) operates, impliedly, to revoke the codicil also. This question, of course, depends mainly upon the contents of the several testamentary documents. If the dispositions in the codicil are so complicated with, and dependent upon, those of the will, as to be incapable of a separate and independent existence, the destruction of the will necessarily revokes the codicil (*u*); and before the Wills Act, the general presumption in the Ecclesiastical Courts was rather in favour of the intention to involve a codicil in the revocation of the will of which it was a part, where a contrary intention could not be collected either from the contents of the codicil itself or from extrinsic evidence (*x*). But if the codicil was capable, from the nature of its contents, of subsisting independently of the will, its validity was not affected by the destruction of the will (*y*).

Effect under Wills Act, where will is destroyed but not the codicil.

The balance of authority seems to support the view that the Wills Act has done away with the presumption, made by the old law, that the destruction of a will was an implied revocation of a codicil thereto (*z*). Lord Penzance repeatedly so held, on the ground that section 20, enacting that "no will or codicil shall be revoked otherwise than" by certain specified methods, plainly excludes the method in question (*a*). And these decisions were followed without dissent by Butt, J. (*b*). But in *Sugden* v. *Lord St. Leonards* (*c*) a demurrer to a plea, dependent for its validity on this view of the statute, was formally (though without argument) overruled by Sir J. Hannen. Perhaps, however, the point is not of much importance. The presumption already stated was never a strong one, even under the old law, and the question whether the codicil was revoked or not always depended, and (supposing the presumption to continue) will still depend,

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(*u*) *Ustickes* v. *Bawden*, 2 Add. 116.

(*x*) *Medlycott* v. *Assheton*, 2 Add. 229; *Coppin* v. *Dillon*, 4 Hagg. 361, 369. See as to the Roman Law on this point, *Falle* v. *Godfray*, 14 A. C. 70.

(*y*) *Tagart* v. *Hooper*, 1 Curt. 289; *In b. Coulthard*, 11 Jur. (N.S.) 184, where the document was described as "a codicil to any will and testament of me," but there was nothing to show that he had ever made a will.

(*z*) See *per* Sir H. Fust, *Clogstoun* v. *Walcott*, 12 Jur. 422; *In b. Halliwell*, 9 Jur. 1042; followed by Sir C. Cresswell, *Grimwood* v. *Cozens*, 5 Jur. (N.S.) 497; *In b. Dutton*, 32 L. J. P. 137. Whether under the old law the presumption existed with respect to codicils dealing with freehold land, appears never to have been decided. The Statute of Frauds, sect. 6, does not, for this purpose, differ materially from s. 20 of the Wills Act.

(*a*) *Black* v. *Jobling*, L. R. 1 P. & D. 685; *In b. Savage*, L. R. 2 P. & D. 78; *In b. Turner*, *ib.* 403; *Eyre* v. *Eyre*, [1903] P. 131.

(*b*) *Gardiner* v. *Courthope*, 12 P. D. 14. See also *Paige* v. *Brooks*, 75 L. T. 455.

(*c*) 1 P. D. 154, 206; the plea had already been pronounced to be not true in fact.

mainly upon the contents of the codicil (*d*), and the effect of the evidence adduced to rebut the presumption (*e*).

It seems that if the will and codicil are written on the same piece of paper, and the testator cuts off the signature to the will, slight evidence is sufficient to show that he meant also thereby to revoke the codicil (*f*).

The question whether the revocation of a will by a codicil, impliedly revokes an intermediate codicil, is referred to later (*g*).

Obliterations, etc., in a will to be signed and attested.

IV.—Obliterations, Interlineations, Cancellations, Etc.—The Wills Act enacts (section 21) "that no obliteration, interlineation, or other alteration (*h*), made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration, or at the foot, or end of, or opposite to a memorandum referring to such alteration, and written at the end of some other part of the will."

Presumption when alteration is made

Where obliterations and interlineations appear on the face of a will, and there is no evidence to show when they were made, the presumption is that they were made after the execution of the will (*i*); but it seems that slight evidence is sufficient to rebut

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(*d*) So imperative did Lord Penzance consider the Act to be, that even where the codicil was unintelligible without the will (the contents of which were unknown), he held himself bound to admit the codicil to probate and leave the question of its operation to the Court of Construction, *In b. Turner*, L. R. 2 P. & D. 403.

(*e*) In *Clogstoun* v. *Walcott* and *In b. Halliwell*, and in *In b. Coulthard*, 11 Jur. (N.S.) 184, and *In b. Clements*, [1892] P. 254, the codicils were held not to be revoked. See also *In b. Ellice*, 33 L. J. P. 27.

(*f*) *In b. Bleckley*, 8 P. D. 169.

(*g*) *Post*, p. 155.

(*h*) As to what is an "interlineation," see *In b. Birt*, L. R. 2 P. & D. 214; *In b. Greenwood*, [1892] P. 7. In both these cases the grant was made by consent. See *Leonard* v. *Leonard*, [1902] P. at p. 243. An interlineation must but an obliteration may not be intentional. *Dundee (Magistrates of)* v. *Morris*, 3 Macq. 134; 6 W. R. 556.

(*i*) *Cooper* v. *Bockett*, 4 Moo. P. C. 419; *Simmons* v. *Rudall*, 1 Sim. (N.S.) 115; *Burgoyne* v. *Showler*, 1 Rob. 5; *In b. Thomson*, 3 N. of C. 441; *Greville* v. *Tylee*, 7 Moo. P. C. 320; *Gann* v. *Gregory*, 3 D. M. & G. 777; *Doe* d. *Shallcross* v. *Palmer*, 16 Q. B. 747; *In b. James*, 1 Sw. & Tr. 238; *In b. White*, 30 L. J. P. 55; *Williams* v. *Ashton*, 1 J. & H. 115; *Re Cruttenden*, 30 W. R. 57; *infra*, n. (*k*); see also *Dundee (Magistrates of)* v. *Morris*, 3 Macq. 134; 6 W. R. 556. If the words cannot be ascertained, the probate may apparently be granted with blanks where the erasures occur. *Doherty* v. *Dwyer*, 25 R. Ir. R. 297. As to alterations where a will is dated before the Wills Act, see *In b. Streaker*, 28 L. J. P. 50; *Banks* v. *Thornton*, 11 Hare, 180; *Benson* v. *Benson*, L. R. 2 P. & D. 172.

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the presumption, unless the alterations are of an important character (*k*).

Incorporation by codicil.

If there be a codicil to the will, and the codicil refers to unattested alterations in the will, this incorporates them in the codicil (*l*). If the codicil takes no notice of them, the presumption is that they were made after the date of the codicil (*m*). And the same presumptions hold regarding mutilation (*n*). But evidence is admissible to show that the alterations in the will were made before the execution of the codicil, and this is generally sufficient to incorporate them (*o*), unless the circumstances show that the testator did not treat them as effectual alterations (*p*).

Where alterations are necessary to supply blanks; or to make sense.

Where a will has been drawn with blanks left for the names of the legatees and the amount of the legacies, or the like, which blanks are afterwards filled up, but there is no evidence to show when, the presumption is that the blanks were filled in before execution. And although there may have been no blanks, but the names of the legatees are found interlined, yet if the interlineation only supplies a blank in the sense, and appears to have been written with the same ink and at the same time as the rest of the will, the Court will conclude that it was written before execution (*q*). In *Birch* v. *Birch* (*r*), where some blanks were filled in with black ink and others with red, it was presumed that the additions in black ink were made before execution, but that those in red ink were made after execution, the envelope in which the will was found appearing to have been sealed, opened and re-sealed.

(*k*) *Keigwin* v. *Keigwin*, 3 Curt. 607; *In b. Jacob*, 1 N. of C. 401; *In b. Hindmarch*, L. R. 1 P. & D. 307; *Tyler* v. *Merchant Taylors' Co.*, 15 P. D. 216; *In b. Duffy*, Ir. R. 5 Eq. 506; *Moore* v. *Moore*, Ir. R. 6 Eq. 166; *In b. Greenwood*, [1892] P. 7; *In b. Tonge*, 66 L. T. 60. Generally declarations of the testator are admissible for this purpose, whether made before or at the time of the execution of his will, *Doe* d. *Shallcross* v. *Palmer*, 16 Q. B. 747; *In b. Hardy*, 30 L. J. P. 142; *In b. Sykes*, L. R. 3 P. & D. 26; *Dench* v. *Dench*, 2 P. D. 60. Those made afterwards are not admissible, *Re Jessop*, [1924] P. 221. It is not enough that the alterations bear earlier date than the will: *In b. Adamson*, L. R. 3 P. & D. 253. In *Re Cruttenden*, 30 W. R. 57, an interlineation affecting a devise of real estate was presumed to have been made before execution, on the ground that it had been included in the probate many years before.

(*l*) *In b. Heath*, [1892] P. 253.

(*m*) *Lushington* v. *Onslow*, 12 Jur. 465; *Rowley* v. *Merlin*, 6 Jur. (N.S.); and compare *In b. Mills*, 11 Jur. 1070.

(*n*) *Christmas* v. *Whinyates*, 32 L. J. P. 73.

(*o*) See *In b. Hall*, L. R. 2 P. & D. 256, where the alterations, being in pencil, were held to be merely deliberative. But in *Tyler* v. *Merchant Taylors' Co.* (15 P. D. 216), alterations made in a will (one in pencil) were held to be incorporated by a subsequent codicil.

(*p*) See *Re Hay*, [1904] 1 Ch. 317.

(*q*) *In b. Cadge*, L. R. 1 P. & D. 543; *In b. King*, 23 W. R. 552. In *In b. Swindin*, 2 Rob. 192, an interpolation was included in the probate, although it interrupted the sense: *sed quaere.*

(*r*) 6 N. of C. 581.

Pencil alterations.

Pencil alterations made before execution, if the body of the will is in ink, are generally disregarded, being *prima facie* merely deliberative (*s*). But if a blank is filled up in pencil before execution, the matter so inserted will be included in the probate (*t*). And if a clause which is inconsistent with the rest of the will is struck out in pencil, it may be treated as cancelled (*u*).

Alterations referred to generally.

Where an attestation clause referred to "a few erasures and interlineations" having been made before execution, it was inferred, from the appearance of the document, that all the alterations had been made before execution (*x*).

Alterations made after execution.

Alterations may be made after the execution of the will, and are effectual under section 21 of the Wills Act (*y*), if properly identified by the signature of the testator and two witnesses. Thus interlineations made in a will after execution, opposite which the testator and the two original attesting witnesses have written their names in the margin, will be included in the probate (*z*). But the signature of the witnesses alone is not sufficient, unless the will is re-executed (*a*). And where a testator made some alterations in his will, and he and the attesting witnesses traced over their former signatures with a dry pen, and the witnesses put their initials in the margin opposite to the several alterations, it was held that the alterations were not duly executed (*b*).

Dry pen signature.

Where new sheets are interpolated.

In *Leonard* v. *Leonard* (*c*), the testator executed a will written on five sheets; he afterwards destroyed the first two sheets and substituted two others, each of which was signed by him and by the two witnesses who attested the original will. It was held by Gorell Barnes, J., that the two new sheets could not be considered as "alterations" within the meaning of section 21 of the Wills Act.

(*s*) *Gann* v. *Gregory*, 3 D. M. & G. 777; *In b. Adams*, L. R. 2 P. & D. 367. See *In b. Hall*, *supra*, n. (o). As to what alterations were deliberative under the old law, if made after execution, see *Dickinson* v. *Stidolph*, 11 C. B. (N.S.) 341; *Ibbott* v. *Bell*, 34 Bea. 395.

(*t*) *Kell* v. *Charmer*, 23 Bea. 195. It does not appear whether any difficulty was raised by the Court of Probate as to evidence.

(*u*) *In b. Tonge*, 66 L. T. 60.

(*x*) *Doherty* v. *Dwyer*, 25 L. R. Ir. R. 297. Compare *In b. Treeby*, L. R. 3 P. & D. 242.

(*y*) *Ante*, p. 143.

(*z*) *In b. Wingrove*, 15 Jur. 91. The initials of the testator and witnesses are sufficient: *In b. Hinds*, 16 Jur. 1161; *In b. Blewitt*, 5 P. D. 116. And if alterations are made in the same sentence, partly on one page and partly on another, it may be sufficient for the testator and witnesses to sign their names on the first page only: *In b. Wilkinson*, 6 P. D. 100. Probably alterations made after execution can be validly identified by the initials of two witnesses different from those who originally attested the will, but the point has not been decided. (See Solicitors Journal, Vol. 52, p. 386.)

(*a*) *In b. Shearn*, 50 L. J. P. 15.

(*b*) *In b. Cunningham*, 29 L. J. P. 71; *In b. Martin*, 6 N. of C. 694.

(*c*) [1902] P. 243. See the remarks on this case, above, p. 134.

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Memorandum as to alterations.

Where two alterations are made in a will after execution, and at the end of the will there is written a memorandum (duly executed and attested) referring expressly to only one of the alterations, it may be inferred from the nature of the alterations that both were intended to be referred to (*d*).

Confirmation by codicil.

As already mentioned, where a testator alters his will by unattested alterations, and afterwards makes a codicil to it, this confirms the alterations (*e*), unless it appears from the codicil or otherwise that the alterations were merely deliberative (*f*).

Pencil alterations.

Under the old law, which allowed alterations to be made in a will of personalty without formality (*g*), the question often arose whether alterations made in pencil were final or mere deliberative, the presumption being that they were not intended as final (*h*). The question can still arise where an altered will is confirmed by a codicil, and the presumption is the same as under the old law (*i*). But the presumption is not always acted on (*k*).

Addition to first codicil.

In *Oldroyd* v. *Harvey* (*l*), a testator duly executed a will and codicil; he afterwards added some words to the codicil, and proceeded to write, on the same piece of paper, below the codicil, some further dispositions commencing thus: "I, the within named H. L., hereby declare this to be a codicil to my within-written will (*m*). I revoke, etc." This second codicil was duly executed and attested. The second codicil and the addition to the first codicil were written by the testator at one sitting. It was held that the addition to the first codicil formed part of the second codicil and must be admitted to probate.

Dependent relative revocation.

The doctrine of dependent relative revocation applies to partial revocation by obliteration or cancellation (*n*). Thus, if a testator bequeaths "to A. B. a legacy of one hundred pounds," and erases the amount, leaving words of bequest and the name of the legatee, this is taken to show an intention to substitute

(*d*) *In b. Treeby*, L. R. 3 P. & D. 242.

(*e*) *In b. Heath*, [1892] P. 253; *Tyler* v. *Merchant Taylors' Co.*, 15 P. D. 216.

(*f*) *Re Hay*, [1904] 1 Ch. 317.

(*g*) *Ravenscroft* v. *Hunter*, 2 Hagg. 65.

(*h*) *Hawkes* v. *Hawkes*, 1 Hagg. 322; *Edwards* v. *Astley*, *ib.* 490; *Parkin* v. *Bainbridge*, 3 Phillim. 321; *Lavender* v. *Adams*, 1 Add. 406; *Francis* v. *Grover*, 5 Ha. 39. As to wills originally written partly in pencil, see *ante*, p. 95.

(*i*) *In b. Hall*, L. R. 2 P. & D. 256.

(*k*) *Tyler* v. *Merchant Taylors' Co.*, 15 P. D. 216.

(*l*) [1907] P. 326.

(*m*) The will was written on one side of several sheets of brief paper, and the two codicils were written on the back of the sheets.

(*n*) Cases under the old law are: *Winsor* v. *Pratt*, 5 J. B. Moo. 484; *Dickinson* v. *Stidolph*, 11 C. B. (N.S.) 341; *Ibbott* v. *Bell*, 34 Bea. 395; *Limbery* v *Mason*, Com. 451; *S.C.*, s.n. *Hide (Hyde)* v. *Mason*, 8 Vin. Abr. 140; *Kirke* v. *Kirke*, 4 Russ. 435; *Locke* v. *James*, 11 M. & W. 901.

some other amount, and that intention having failed, the amount of the original bequest can be supplied by parol evidence (*o*). So if a testator erases the amount and writes some other amount over it (*p*). But if the bequest is "to A. B., one hundred and fifty pounds," and the testator erases the words "one hundred and," without substituting any other amount, it is inferred that the testator's intention was simply to revoke the bequest *pro tanto*, and the bequest of the one hundred pounds being illegible, the legacy stands at fifty pounds (*q*).

Effect of obliteration.

It follows from the terms of the statute that no cancellation or obliteration (unless attested in manner required by the act, or confirmed by a codicil, or unless it prevents the words, as originally written, from being apparent), can operate as a revocation of a testamentary disposition, however clearly the testator may have expressed his intention (*r*). In some cases the name of a legatee, which has been completely obliterated by the testator, has been supplied by inference from the context (*s*). Even if the testator partially erases his own signature and those of the attesting witnesses, this is no revocation (*t*). Glasses (*u*), and special arrangements of light (*x*), have been used for discovering what the words obliterated originally were; but parol evidence is inadmissible (*y*), except in those cases where the obliteration was made for the purpose merely of altering the amount of the gift and not of revoking it; in which case, there being no intention to revoke except for the purpose of substituting a gift of a different amount, if the latter cannot take place by reason of the substituted words not being properly attested, the former gift will now (as under the Statute of Frauds) remain good, and evidence must be admitted to show what the original words were (*z*). The same rule applies, where the necessary

Parol evidence admissible in cases of conditional revocation.

(*o*) See *In b. Horsford*, L. R. 3 P. & D. 211, cited *infra*, notes (*z*) and (*c*).

(*p*) *In b. Nelson*, Ir. R. 6 Eq. 569.

(*q*) *In b. Nelson, supra; In b. Ibbetson*, 2 Curt. 337.

(*r*) *In b. Dyer*, 5 Jur. 1016; *In b. Fary*, 15 Jur. 1114; *Stephens* v. *Taprell*, 2 Curt. 458; *In b. Beavan, ib.* 369; *In b. Rose*, 4 N. of C. 101; *In b. Brewster*, 29 L. J. P. 69; *Sturton* v. *Whetlock*, 52 L. J. P. 29.

(*s*) *Furniss* v. *Phear*, 36 W. R. 521.

(*t*) *In b. Godfrey*, 69 L. T. 22.

(*u*) *In b. Ibbetson*, 2 Curt. 337; *Lushington* v. *Onslow*, 12 Jur. 465; *In b. Brasier*, [1899] P. 36.

(*x*) *Ffinch* v. *Combe*, [1894] P. 191.

(*y*) *Townley* v. *Watson*, 3 Curt. 761.

(*z*) *Soar* v. *Dolman*, 3 Curt. 121; *Brooke* v. *Kent*, 3 Moo. P. C. C. 334; *In b. Ibbetson*, 2 Curt. 337; *In b. Reeve*, 13 Jur. 370. See *In b. Nelson*, Ir. R. 6 Eq. 569; *In b. Horsford, post*, note (*c*); *Jeffery* v. *Cancer Hospital*, 57 L. T. 600. If there is no evidence what the words were, probate is decreed in blank: *In b. James*, 1 Sw. & Tr. 238; *Doherty* v. *Dwyer*, 25 L. R. Ir. 297.

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evidence is forthcoming, to an erasure of the name of a legatee (*a*); and to an erasure of the name of an executor (*b*).

Obliteration by pasting paper over words.

Where the obliteration has been effected by pasting a piece of paper over a complete clause in the will, the Court will not order it to be removed, but will endeavour to ascertain what the words of the clause are; if this can be done they are "apparent" within the meaning of the section (*c*). But where the testator has only covered up the amount of the legacy, leaving the legatee's name untouched, the Court will consider it a case of dependent relative revocation, and will endeavour to discover the amount of the legacy originally bequeathed by removing the piece of paper (*d*). And it seems that where the testator has written words on the back of a testamentary paper and afterwards pasted a piece of paper over them, the Court can direct the removal of it in order to ascertain whether the words amount to a revocation (*e*).

Satisfaction proved by obliteration.

Striking a pen through the gift to a legatee, though not now a sufficient revocation of a legacy, and not to be noticed in the probate, may nevertheless not be altogether without use; for where the testator has paid a sum in his lifetime to the legatee, it seems that the fact of the gift being struck out in the original will, would be received as evidence that the payment was intended to be in satisfaction of the legacy (*f*); and the Court of Probate has sometimes granted fac-simile probate of a will, showing interlineations, or parts of the will struck through (*g*).

Devises not to be revoked as to testator's disposable interest at decease, by conveyance or like act.

V.—Revocation by Alteration of Estate.—The Wills Act provides (section 23) that no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate, as the testator shall have power to dispose of by will at the time of his death (*h*).

Sale or conveyance of devised land.

In regard to wills which are within this section, a subsequent conveyance of the devised property will not produce revocation, except so far as it substantially alienates the estate, and with-

(*a*) *In b. McCabe*, L. R. 3 P. & D. 94. See *Short* v. *Smith*, 4 East, 419.

(*b*) *In b. Parr*, 29 L. J. P. 70; *In b. Harris*, 29 L. J. P. 79; *In b. Greenwood*, [1892] P. 7. See also *per* Sir W. Grant, 7 Ves. 379; and *Hale* v. *Tokelove*, 2 Rob. 318, noticed *post*, p. 183; *In b. McCabe*, L. R. 3 P. & D. 94. *In b. Bedford*, 5 N. of C. 188, is contra. *Sed qu.*

(*c*) *In b. Horsford*, L. R. 3 P. & D. 211; *Ffinch* v. *Combe*, [1894] P. 191.

(*d*) *Ibid.*

(*e*) *In b. Gilbert*, [1893] P. 183.

(*f*) *Twining* v. *Powell*, 2 Coll. 262.

(*g*) *Gann* v. *Gregory*, 3 D. M. & G. 777; *Shea* v. *Boschetti*, 23 L. J. Ch. 652.

(*h*) As to the meaning of the section, see *Blake* v. *Blake*, 15 Ch. D., at p. 487.

draws it from the operation of the devise by vesting the property in another. If a testator, after devising an estate, sells and conveys it to a third person, of course the devise is still (as formerly) rendered inoperative, and the devisee can have no claim to the proceeds of the sale, even though the will should have directed the conversion of the property, and the proceeds can be traced into an investment (*i*). If the testator sells a specifically devised piece of land, and afterwards buys another piece of land answering the same description, the question whether that passes by the devise is governed, not by section 23, but by section 24, the effect of which is considered in Chapter XII.

Devise is revoked by contract to sell.

Where the testator contracts to sell the devised estate, and dies without having executed a conveyance to the purchaser, the devise remains in force as to the legal estate and no further, this being all the interest which the testator has power to dispose of at his decease, and the conversion, as between the real and personal representatives, being completely effected, and the estate of the vendor being in contemplation of equity "disposed of" by the contract (supposing it to be a binding one (*k*)), the devisee takes only the legal estate (*l*), and the purchase-money constitutes part of the testator's personal estate (*m*).

Effect of compulsory conversion.

A devise is also, as a general rule, revoked or adeemed if the land is converted, during the testator's lifetime, by some person other than the testator, or by operation of law; as, by Act of Parliament (*n*), or by an order for sale pronounced by a Court of competent jurisdiction (*o*), or by compulsory sale under the Lands Clauses Acts, or similar Acts (*p*), or by sale under a power given by the testator to a mortgagee (*q*). And although the

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(*i*) See *Arnald* v. *Arnald*, 1 Br. C. C. 401; *Manton* v. *Tabois*, 30 Ch. D. 92. Even if the testator takes a mortgage from the purchaser to secure the purchase-money, the benefit of the mortgage debt does not pass to the devisee: *Re Clowes*, [1893] 1 Ch. 214; *Re Richards*, 65 Sol. J. 542.

(*k*) As to which see *post*, p. 712, where the effect of rescinding the contract after the testator's death is considered.

(*l*) As to the operation of a devise of trust estates, see *Lysaght* v. *Edwards*, 2 Ch. D. 499. The provisions of section 1 of the Administration of Estates Act, 1925, must be born in mind.

(*m*) *Farrar* v. *Earl of Winterton*, 5 Bea. 1; *Moor* v. *Raisbeck*, 12 Sim. 123. These decisions confirmed the author's previous opinion; see 1st ed. p. 148, where he cites *Knollys* v. *Shepherd* (*post*, p. 713) to show that, even under the old law, a devise of land which the testator had previously contracted to sell, passed the legal estate only. But the devisee is entitled to the rent until completion: *Watts* v. *Watts*, L. R. 17 Eq. 217.

(*n*) *Frewen* v. *Frewen*, L. R. 10 Ch. 610; *Richards* v. *Att.-Gen.*, 6 Moo. P. C. C. 381; *Cadman* v. *Cadman*, L. R. 13 Eq. 470.

(*o*) *Steed* v. *Preece*, L. R. 18 Eq. 192; and the other cases cited *post*, p. 715. The order operates a conversion as from its date, and before any sale has taken place: *Hyett* v. *Mekin*, 25 Ch. D. 735.

(*p*) See *post*, p. 716.

(*q*) *Wright* v. *Rose*, 2 S. & St. 323; *Bourne* v. *Bourne*, 2 Hare, 35. In both these cases no sale was made until after the testator's death, and therefore it

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converting effect of a sale under an Act of Parliament or under an order of Court is neutralised, if the statute (*r*) or order (*s*) directs a re-investment in land to be settled to the same uses, yet it seems clear that this would not cause the will to operate on the substituted land (*t*). For the same principle seems to apply as that which governs the case of land being appointed under a power, and afterwards sold under a power of sale containing a direction for re-investment in land (*u*).

Sale in lunacy.

A sale by the Court in lunacy formerly operated as a conversion for all purposes (*x*), but this rule was altered by the Lunacy Regulation Act, 1853, section 119 of which enacted that the surplus proceeds of sale of the land of a lunatic should belong to his heirs, devisees, etc., in the same way as the land would have devolved if it had not been sold (*y*). And a similar, but somewhat wider, provision is contained in the Lunacy Act, 1890 (*z*).

Purchase of land in lunacy.

If the money of a lunatic is invested by his committee by order of the Court, in the purchase of land, and the land is conveyed to the committee subject to a declaration that it shall be considered as part of the lunatic's personal estate, and the lunatic dies before 1894, probate duty is payable on the value of the land (*a*).

Settlement.

It is hardly necessary to say that a conveyance by way of settlement revokes a devise of the same property (*b*).

Personalty.

Where personal property is specifically bequeathed and afterwards sold, the effect is generally to adeem the bequest (*c*). And a valid contract of sale will have the same effect (*d*). But an unauthorised sale of personal property (as by persons assuming to act for an insane person) does not affect the rights of legatees (*e*). A sale of personal property of a lunatic by

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was held there was no conversion, quoad the surplus. Compare *Jones* v. *Davies*, 8 Ch. D. 216. An unauthorised sale by a third person would not, it is conceived, defeat the claim of the devisee to the proceeds of sale. See *Taylor* v. *Taylor*, 10 Hare, 478, 479; *Re Tugwell*, 27 Ch. D. 309.

(*r*) See cases cited *post*, p. 715.

(*s*) *Fellow* v. *Jermyn*, [1877] W. N. 95.

(*t*) The proceeds of sale would go to the heir or residuary devisee: *Re Bagot's Settlement*, 31 L. J. Ch. 772.

(*u*) *Gale* v. *Gale*, 21 Bea. 349; *Beddington* v. *Baumann*, [1903] A. C. 13, and the other cases cited *post*, p. 814.

(*x*) *Oxenden* v. *Lord Compton*, 2 Ves. Jun. 69.

(*y*) *Re Freer*, 22 Ch. D. 622; *Re Matson*, [1897] 2 Ch. 509. See also section 135, and *post*, p. 1056.

(*z*) Section 123; *Re Alston*, [1917] 2 Ch. 226. As to land in Ireland, see *Latham* v. *Travers*, [1912] 1 Ir. R. 140.

(*a*) *Att.-Gen.* v. *Ailesbury*, 12 A. C. 672, *post*, p. 720.

(*b*) *Lowndes* v. *Norton*, 33 L. J. Ch. 583.

(*c*) See *post*, p. 1053.

(*d*) *Watts* v. *Watts*, L. R. 17 Eq. 217.

(*e*) *Taylor* v. *Taylor*, 10 Ha. 478.

order of the Court adeems a specific bequest of it if the proceedings are taken under the Lunacy Regulation Act, 1853 (*f*), but not, it seems, if they are taken under the Act of 1890, and the proceeds of sale can be identified (*g*).

Surrender of lease.

Where a testator disposes of a house which he holds on lease, and afterwards surrenders it and acquires another lease of the same house, the question whether the dispositions of the will apply to the new lease seems to be one of construction. In *Wedgwood* v. *Denton* (*h*) the question was answered by Bacon, V.-C., in the affirmative, although there the duration of the trusts declared by the will depended on the term of the original lease, which was different from that of the new lease.

Bequest of term how affected by purchase of the fee.

How a specific bequest of leaseholds is affected, under section 23 of the Wills Act, by the subsequent acquisition of the fee, was considered in *Cox* v. *Bennett* (*i*), where a testator having bequeathed "his houses at T, held on lease from B," to X, and the residue of his real and personal estate to Y, afterwards purchased and took a conveyance to himself of the reversion in fee. It was held by Sir G. Giffard, V.-C., that the entire interest in the houses passed by the specific gift to X. He said: "The clause in the statute (*i.e.*, section 23) says that the will is to pass such estate or interest in such real or personal estate as the testator shall have power to dispose of at his death; and there is nothing in the will to confine its operation to the interest which the testator had at the date of the will." This question is further considered in Chapter XII.

Partial revocation by alienation.

"A revocation by alienation," as Mr. Jarman points out (*k*), "may be either partial or total. A simple case of partial revocation occurs where a testator, having devised lands in fee, demises the same lands to a lessee for lives or for years, either at a rent or not, in which case the lease revokes or subverts the devise *pro tanto*, by subtracting or withdrawing the demised interest from its operation (*l*), but the devise is no further dis-

(*f*) *Re Freer*, 22 Ch. D. 622; *Jones* v. *Green*, L. R. 5 Eq. 555.

(*g*) Lunacy Act, 1890, s. 123. This section does not apply to a bank balance which under an order in lunacy has been invested in stock, *Re Walker*, [1921] 2 Ch. 63. See *post*, p. 1056.

(*h*) L. R. 12 Eq. 290; *post*, p. 382.

(*i*) L. R. 6 Eq. 422. See also *Struthers* v. *Struthers*, 5 W. R. 809. Both these cases appear to require the further support of s. 3, which enables a testator to dispose of all real estate to which he may be entitled at the time of his death, and of s. 24, which enacts that every will shall be construed with reference to the real and personal estate comprised in it to take effect as if it had been executed immediately before the testator's death; for s. 23 says only that no subsequent act shall *prevent* the will operating, implying that but for the subsequent act the will would have operated on the interest in question; which it would not have done without the aid of ss. 3, 24.

(*k*) First edition, p. 130.

(*l*) *Hodgkinson* v. *Wood*, Cro. Car. 23; *Lamb* v. *Parker* (*Parker* v. *Lamb*), 2 Vern. 495, 3 Br. P. C. 12.

turbed; and, consequently, the devisee would, even under the old law, still take the inheritance, subject to the term, and, as incidental thereto, the rent, if any, reserved by the lease (*m*). So, if a testator, after devising lands in fee, conveys them by deed to the use of himself for life, with remainder to the use of his wife for life, as a jointure, without disposing of or in any manner assuming to convey the inheritance, the conveyance would revoke the devise *pro tanto*, and the reversion in fee, expectant on the decease of the testator's wife, would pass under it to the devisee. In both the preceding examples, it will be perceived, that the conveyance is not only partial in its object, but in its operation; it does not for a moment disturb the testator's seisin of the inheritance, and, therefore, can have no revoking effect, beyond the estate which it substantially alienates and vests in another person. Consistently with this principle, it is clear, that (*n*) where a testator by his will charges his lands with an annuity, and afterwards demises them for a term of years at rack rent, the devise is revoked so far as to deprive the devisee of his legal power of distress, while the tenancy lasts, but no further; and the annuitant would be entitled in equity, during the suspension of his power of distress, to have the rent, or an adequate portion of it, applied in satisfaction of the annuity."

VI.—Express Revocation by a subsequent Will, Codicil or Writing.—A will or codicil may operate as a revocation of a prior testamentary instrument, by the effect either of an express clause of revocation, or of an inconsistent disposition of the previously devised property (*o*).

Under section 20 of the Wills Act the revocation may be by a writing (duly executed and attested) declaring an intention to revoke. This writing need not be testamentary and unless testamentary will not be admitted to probate (*p*).

Distinction between revocation

Express revocation may, it seems, be produced in two different modes, having different effects. Thus, if there be a

(*m*) *A fortiori*, since 1 Vict. c. 26, *Barrs* v. *Lea*, 33 L. J. Ch. 437, where on a mining lease it was unsuccessfully argued that certain sums payable half yearly were not rent but purchase-money for the minerals, though payable by instalments: as to which, see further *Brook* v. *Badley*, L. R. 4 Eq. 106; and compare *Re Mary Smith*, L. R. 10 Ch. 79.

(*n*) *Parker* v. *Lamb*, 3 Br. P. C. 12.

(*o*) A revocation by reference is, of course, equivalent to an express revocation. The question arose in *Re Courtauld's Estate*, [1882] W. N. 185; it was held that there was no revocation, but a substitution.

(*p*) *In b. Fraser*, L. R. 2 P. & D. 40; *In b. Eyre*, [1905] 2 Ir. R. 540; *Toomer* v. *Sobinska*, [1907] P. 106. See also *In b. Hicks*, L. R. 1 P. & D. 683; *In b. Durance*, L. R. 2 P. & D. 406. Such a writing may be executed by a married woman: *Hawksley* v. *Barrow*, L. R. 1 P. & D. 147. As to what amounts to a declaration of intention to revoke, see *In b. Gosling*, 11 P. D. 79.

of a gift and of so much of will as contains the gift.

bequest by will to several persons as tenants in common, and by codicil the testator revoke the bequest to one of them, his share, as a general rule (*q*), will not accrue to the others (*r*). This is the ordinary mode. But if the testator revoke "so much of my will" as contains the gift to one of such persons, here, if the words that remain are sensible *per se*, and amount without further alteration to a gift of the whole subject to the others, these will take the whole, the will being read as if the revoked words had never been in it. *Harris* v. *Davis* (*s*) affords an example of the latter mode. In that case there was first a gift to A and B in common; then, in a subsequent part of the will a direction that C should take a share with A and B; and afterwards a codicil revoking "that part written in my will which leaves" the share to C: and it was held that A and B took the whole. The frame of the will was peculiar, and lent itself easily to this construction. If the words that are left require (as they generally would) some further alteration or addition to make them sensible, the construction will not be made (*t*).

There are cases where the testator directs his will to be read as if the name of A were substituted for B in which it has been held on the true construction that B did not lose a share of the residue (*u*) or A did not get a legacy given to B (*x*); and also cases, where a direction that a will should be read as if the name of C had not been inserted therein, did not deprive C of a legacy (*y*). When the residue is given to named persons in common and the gift to one of them is revoked, it may be that the others take and there is no lapse (*z*). There is no lapse when the gift is to a class (*a*).

If a codicil expressly revokes part of a will, its operation is not, it seems, restrained by a recital in the codicil showing that the testator did not intend the revocation to be absolute (*b*).

Intention to revoke,

In order that an express clause of revocation may be effec-

(*q*) For an exception to the rule, see *Re Radcliffe*, *infra*, p. 157.

(*r*) *Cresswell* v. *Cheslyn*, 2 Ed. 123; *Ramsay* v. *Shelmerdine*, L. R. 1 Eq. 129. Compare *Humble* v. *Shore*, 7 Hare, 247; *Skrymsher* v. *Northcote*, 1 Sw. 566; and *Shaw* v. *M'Mahon*, 4 D. & War. 431; and see *post*, pp. 1016 *et seq.*

(*s*) 1 Coll. 416.

(*t*) *Sykes* v. *Sykes*, L. R. 4 Eq. 200; 3 Ch. 301; *Re Hodgkinson*, [1893] W. N. 9.

(*u*) *Re Freeman*, [1910] 1 Ch. 681; the object was merely to substitute A for B as executor.

(*x*) *Re Mellor*, 56 Sol. J. 596.

(*y*) *Re Percival*, 59 L. T. 21. But such expressions may have their full effect: *Re Jermingham Trusts*, [1922] 1 Ir. R. 115.

(*z*) *Re Whiting*, [1913] 2 Ch. 1, disapproved in *Re Wilkins*, [1920] 2 Ch. 63. See also *Re Donaldson*, [1915] 1 Ir. R. 63.

(*a*) *Re Dunster*, [1909] 1 Ch. 103.

(*b*) See *Holder* v. *Howell*, 8 Ves. 97; *Viscount Holmesdale* v. *West*, L. R. 3 Eq. 486, 4 H. L. 543.

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whether present or future.

tual, it must indicate an actual and present intention to revoke the will; and if the testator's expressions are declaratory only of a future design, they will not be sufficient (*c*); and in an early case, before the Statute of Frauds, a distinction is taken between the effect of a testator saying "I will revoke my will made at P.," which refers to a future act, and when he says "my will made at P. shall not stand," which is a present resolution, the latter being, it was considered, an actual revocation, and the former not (*d*).

Mere intention to revoke by a future act inoperative.

Of course, a mere intimation by a testator of his intention to make by a future act a new disposition, does not effect an actual present revocation. Thus, where A (*e*) made a will, disposing of his real and personal property, and afterwards, the residuary legatee of the personalty being dead, and A having acquired other real property, he made another will whereby he devised the newly-acquired property, and then wrote as follows :—"As to the rest of my real and personal estate I intend to dispose of the same by a codicil to this my will hereafter to be made": it was held that this clause was not a revocation of the prior will. But the operation of an express revocation of a will is not affected by the testator adding that he intends to make a new will (*f*).

Express clause of revocation restrained by construction.

And even an express clause of absolute and present revocation of all former wills may be reduced to total or partial silence, by showing that the clause was inserted by mistake (*g*). There are also decisions to the effect that a clause of revocation will be disregarded where it is unreasonable to give unrestrained effect to the words; as in cases where, by one testamentary paper, a person exercises a power of appointment, and then by subsequent instruments containing a general clause of revocation, either exercises another and distinct power (*h*), or deals with his own property, and not with the subject of the former power (*i*). But these decisions are now of doubtful authority (*k*). And even before the modern doctrine was established, the rule supposed to be laid down in the earlier cases was not applied, if the

(*c*) *Cleoburey* v. *Beckett*, 14 Bea. 588.

(*d*) *Burton* v. *Gowell*, Cro. El. 306.

(*e*) *Thomas* v. *Evans*, 2 East, 488. See also *Griffin* v. *Griffin*, 4 Ves. 197 n.

(*f*) *Toomer* v. *Sobinska*, [1907] P. 106.

(*g*) *Powell* v. *Mouchett*, 6 Madd. 216; *In b. Oswald*, L. R. 3 P. & D. 162; and cases cited *ante*, p. 32.

(*h*) *In b. Meredith*, 29 L. J. P. 155. The parol evidence read at the bar in this case of course formed no ingredient in its decision. See also *In b. Merritt*, 4 Jur. (N.S.) 1192; *In b. Joys*, 30 L. J. P. 169.

(*i*) *Hughes* v. *Turner*, 4 Hagg. Eccl. 52; *Denny* v. *Barton*, 2 Phillim. 575.

(*k*) See *Re Kingdon*, 32 Ch. D. 604; *Cadell* v. *Wilcocks*, [1898] P. 21; *D'Este's Settlement Trusts*, [1903] 1 Ch. 900, and *post*, p. 812.

testator in the latter will again referred to the power exercised by the former will (*l*).

Intermediate codicils.

If a testator makes a will and one or more codicils, and then makes a codicil revoking the will, this does not necessarily revoke the intermediate codicils: the question is whether the testator distinguishes between the will and the codicils (*m*).

Dependent relative revocation.

Questions of dependent relative revocation arise most commonly in cases where a will is destroyed or revoked by some physical act (*n*), and although the question can arise where a will purports to be revoked by a subsequent testamentary instrument, it would seem that there is greater difficulty in applying the general principle to such cases, because revocation by a written instrument is more deliberate and unambiguous than revocation by destruction.

Difference between devising and revoking clauses of Statute of Frauds.

Mr. Jarman states the law thus (*o*): "Though the Statute of Frauds required that a will which revoked a devise of freehold lands should be attested by the same number of witnesses, as a will devising such lands, yet, in some particulars, the prescribed ceremonial differed in the respective instances. Thus, a devising will was required to be subscribed by the witnesses in the testator's presence, which a revoking will was not, and a revoking will was required to be signed by the testator in the presence of the witnesses, while a devising will needed not to be signed in their presence; each therefore had a circumstance not common to both. This difference, however (which probably occurred without design), has been attended with little practical effect, for it seldom happens that a testamentary instrument is executed for the mere purpose of revoking a previous will, and if it contain a new disposition, any revoking clause therein will be a nullity, whether the substituted devise takes effect or not, though for widely different reasons in the respective cases. If the devise with which the clause in question is associated be effective, it reduces the latter to silence by rendering it unnecessary, the new devise itself producing the revocation, so that the efficacy of the will as a revoking instrument cannot, in such a case, become a subject of consideration. If, on the other hand, the new devise be ineffectual, on account of the attestation being insufficient for

Revocation connected with new disposition.

(*l*) *In b. Eustace*, L. R. 3 P. & D. 183, citing *Richardson* v. *Barry*, 3 Hagg. 249.

(*m*) *Farrer* v. *St. Catharine's College*, L. R. 16 Eq. 19, following *Bunny* v. *Bunny*, 3 Bea. 109, and *Pratt* v. *Pratt*, 14 Sim. 129.

(*n*) *Ante*, p. 135.

(*o*) First edition, p. 153. This paragraph appeared in the third edition, by Messrs. Wolstenholme and Vincent, and in the fourth edition, by Vincent.

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Revocation, where devise intended to be substituted fails.

a devising, though sufficient for a revoking will, the revoking clause becomes inoperative on another principle, namely, that the revocation is conditional and dependent on the efficacy of the attempted new disposition, and that failing, the revocation also fails; the purpose to revoke being considered to be, not a distinct independent intention, but subservient to the purpose of making a new disposition of the property; the testator meaning to do the one so far only as he succeeds in effecting the same" (*p*).

In *Tupper* v. *Tupper* (*q*), the testator by his will bequeathed valid legacies to various persons; by a codicil he revoked them, "and in lieu thereof" bequeathed a legacy which failed under the Mortmain Acts; it was held that the revocation took effect.

The cases of *Eggleston* (or *Eccleston*) v. *Speke* and *Onions* v. *Tyrer* (*r*), which Mr. Jarman cites in support of the rule stated by him, could not now occur, because, since the Wills Act, a will which is valid for purposes of revocation is also valid, so far as execution goes, for purposes of disposition.

In *In b. Gentry* (*s*), a testator executed a testamentary document in which he expressed a desire to cancel a will made in 1866, "and that the will that I made on the 17th of October, 1855, with the codicil dated February 21st, 1871, should stand as my last will and testament." The instrument of October 17, 1855, was not a will, but a settlement, which only included certain property then belonging to the testator; it was held that the revocation of the will of 1866 was absolute. Sir James Hannen said it seemed to him "in the highest degree unnatural" that the testator intended the revocation of the will of 1866 to be contingent on the settlement operating as a will, and he held that the revocation was absolute. But it is submitted that the application of the doctrine of dependent relative revocation, in cases where the testator wishes to give effect to a prior testamentary disposition, is not based on the supposition that the revocation is conditional; it depends on mistake (*t*). In *In b. Gentry* the testator erroneously supposed that the settlement was testamentary in character; this was shown by his describing it as "the will" that he had made; in other words, he supposed

(*p*) *Eccleston* [*Eggleston*, or *Edlestone*] v. *Speke*, Carth. 79, 1 Show. 89, 3 Mod. 258; *Onions* v. *Tyrer*, 2 Vern. 741; *S. C.*, 1 P. W. 343. See also *Ex p. Earl of Ilchester*, 7 Ves. 348; *Kirke* v. *Kirke*, 4 Russ. 435; *Ward* v. *Van der Loeff*, [1924] A. C. 653; *Re Bernard's Settlement*, [1916] 1 Ch. 552; *In b. Irvine*, [1919] 2 Ir. R. 485.

(*q*) 1 K. & J. 665. Compare *Nevill* v. *Boddam*, 28 Bea. 554. The case of *Quinn* v. *Butler*, L. R. 6 Eq. 225, is referred to *post*, p. 814. It was argued in *Baker* v. *Story*, 23 W. R. 147, that the rule had been altered by the Wills Act, but Jessel, M.R., rejected the suggestion.

(*r*) As to this case, see *Re Carey*, [1901] 1 Ir. R. at p. 94.

(*s*) L. R. 3 P. & D. 80.

(*t*) See the cases on dependent relative revocation by destruction, *ante*, p. 135.

that it would operate on all the property belonging to him at his death, and under this mistaken belief he revoked the will of 1866; the revocation was therefore, it is submitted, inoperative, under the doctrine laid down by Mr. Jarman.

Ward v. *Van der Loeff.*

The doctrine of dependent relative revocation was discussed in the difficult case of *Ward* v. *Van der Loeff* (*u*), where the testator devised his residuary estate upon trust to pay the income to his wife for life, and after her decease in trust for her children as therein mentioned, and if there should be no such child, then the testator gave to his wife a power of appointment among the children of his brothers and sisters, and in default he gave his residue to all the children of his brothers and sisters. By a codicil, after declaring that the life interest given to his wife should be terminable on her re-marriage, unless such re-marriage should be with a natural-born British subject, he revoked the power of appointment given to his wife and declared that after her death his trustees should stand possessed of his residue in trust for all or any the children or child of his brothers and sisters who should be living at the death of his wife or born at any time afterwards, before any one of such children for the time being in existence attained a vested interest, and who being a son or sons attained the age of twenty-one years or being a daughter or daughters attained that age or married, if more than one in equal shares. The testator died without issue. The gift in the codicil was void for remoteness. The House of Lords held that there was no implied revocation of the gift in the will, which accordingly took effect.

Revocation of gift to deceased legatee.

Notwithstanding the general rule, that the revocation of a gift to one of several tenants in common does not enure for the benefit of the others, it may do so if that is the testator's intention. Thus in *Re Radcliffe* (*x*), the testatrix left her residuary estate to A, B, C and D as tenants in common; D predeceased the testatrix; by a codicil referring to his death she revoked whatever interest D had in her will; it was held that this took the name of D out of the will, and that A, B and C took the whole residue.

Revocation by testator domiciled abroad.

In *Cottrell* v. *Cottrell* (*y*), a testator made a will in England disposing of all his property, real and personal; fifteen years later, being then domiciled in Italy, he made a will there by which he disposed of his personal property, and declared that he revoked every other will which he might have made; it was held

(*u*) [1924] A. C. 653, reversing *Re Burnyeat*, [1923] 2 Ch. 52.
(*x*) 51 W. R. 409. See *ante*, p. 153.
(*y*) L. R. 2 P. & D. 397.

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that this revoked the English will so far only as related to the personalty and the appointment of executor.

Words of revocation inserted in attestation clause.

An attestation clause is no part of a codicil, and consequently if words purporting to revoke an earlier testamentary instrument are inserted in the attestation clause of a codicil, they have no revoking effect (*z*).

Revocation by inconsistency of disposition.

VII.—Implied Revocation by inconsistent Will or Codicil (*a*). —The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly or in effect revoke the former, or the two be incapable of standing together; for though it be a maxim that no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary) may be admitted to probate as together containing the last will of the deceased. And if a subsequent testamentary paper be partially inconsistent with one of an earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent (*b*).

Where two wills are partially inconsistent.

Accordingly, where a testator made a will in 1823, and a few years later made another will, not referring to the former, and not containing any clause of revocation, both wills were admitted to probate, the two documents being only partially inconsistent (*c*). On the other hand, even if the earlier will disposes of all the testator's property, and the later will does not contain a clause of revocation or any residuary gift, it may appear from a comparison of the two documents that the later was intended to revoke the earlier (*d*). But on the whole it seems that there is a presumption against revocation by equivocal words (*e*).

(*z*) *In b. Atkinson*, 8 P. D. 165.

(*a*) It is hardly necessary to point out that the term "revocation" is not strictly applicable where mutually inconsistent provisions are found in the same testamentary instrument. This subject is considered in Chap. XVII. The mere subsequent execution of a will is not in itself a revocation of a *donatio mortis causa*: *Hudson* v. *Spencer*, [1910] 2 Ch. 285.

(*b*) This statement of the law, which is taken from Williams on Executors, 7th ed., Vol. I, 162, has been judicially approved: *Lemage* v. *Goodban*, L. R. 1 P. & D. 57; *In b. Petchell*, L. R. 3 P. & D. 153; *Townsend* v. *Moore*, [1905] P. 66; *Simpson* v. *Foxon*, [1907] P. 54; see also *Seymor* v. *Nosworthy* (*Northwortly*), Hard. 374, Show. P. C. 146; *Goodright* v. *Harwood*. 2 W. Bl. 937, 7 Br. P. C. 489; *In b. Summers*, 84 L. T. 271; *Deakin* v. *Garvie*, 36 T. L. R. 122; *Vencatanarayana Pillay* v. *Subammal*, 32 T. L. R. 118.

(*c*) *Lemage* v. *Goodban*, L. R. 1 P. & D. 57; *In b. Fenwick*, *Ib.* 319; *In b. Griffith*, 2 *Ib.* 457; *Leslie* v. *Leslie*, Ir. R. 6 Eq. 332; *In b. Budd*, 3 Sw. & T. 196; *Birks* v. *Birks*, 34 L. J. P. 90; *In b. Hartley*, 50 L. J. P. 1; and *Reeves* v. *Reeves*, [1909] 2 Ir. R. 521.

(*d*) *In Estate of Bryan*, [1907] P. 125, referred to *post*, p. 163.

(*e*) *Stoddart* v. *Grant*, 1 Macq. 163.

Contents of later will must be proved.

It follows from the general principle above stated, that if a testator makes two wills, and the later one is lost or destroyed, and there is no evidence to show that it expressly or impliedly revoked the earlier will, the earlier will is entitled to probate (*f*).

Parol evidence.

If the second will is lost or destroyed, parol evidence is admissible to prove its contents (*g*).

"Last" or "last and only" will.

An instrument stating itself to be the testator's "last will," or his "last and only will" (*h*), does not necessarily operate to revoke a prior will, as regards either real (*i*) or personal (*k*) estate (*l*), although the circumstance is one to be considered (*m*).

If a testator makes two codicils to his will, and then makes a a third by which he confirms his will and the first codicil, without referring to the second, this does not necessarily operate as a revocation of the second codicil (*n*).

In *Jane* v. *Jane* (*o*) the testator made a will in 1909 and another will in 1912. In 1916 he made a codicil beginning: "This is a Codicil to my last will dated December 18, 1909," and revoked the appointment of the executors in the will of 1909. It was held that this did not revive the will of 1909 and revoke that of 1912.

"The most simple and obvious case of revocation by inconsistency of disposition," as Mr. Jarman points out (*p*), "is that of a testator having devised lands to a person in fee, and then, by a subsequent will, devising the same lands to another in fee; in such case the latter devise would operate as a complete revocation of the former (*q*). And here, the learned reader cannot fail to perceive in the difference of construction which has obtained, where two devises in fee of the same land are found in one and the same will, and where they are found in

(*f*) *Hellier* v. *Hellier*, 9 P. D. 237. See *Hitchins* v. *Basset*, 2 Salk. 592; *Hungerford* v. *Nosworthy*, Show. P. C. 146; *Dickinson* v. *Stidolph*, 11 C. B. (N.S.) 341.

(*g*) *Brown* v. *Brown*, 8 Ell. & B. 876, *ante*, p. 140; *M'Ara* v. *M'Cay*, 23 L. R. Ir. 138, *post*, p. 162, n. (*g*).

(*h*) *Simpson* v. *Foxon*, [1907] P. 54.

(*i*) *Freeman* v. *Freeman*, 5 D. M. & G. 704.

(*k*) *Cutto* v. *Gilbert*, 9 Moo. P. C. C. 131; *Richards* v. *Queen's Proctor*, 18 Jur. 540; *Lemage* v. *Goodban*, L. R. 1 P. & D. 57; *In b. De la Saussaye*, L. R. 3 P. & D. 42; *In b. Petchell*, *ib.* 153; *Leslie* v. *Leslie*, Ir. R. 6 Eq. 332; *In b. O'Connor*, 13 L. R. Ir. R. 406.

(*l*) See the cases cited *post*, p. 163, n. (*h*), in some of which the revoking will was declared to be the "last will." And see *Loftus* v. *Stoney*, 17 Ir. Ch. 178, *post*, p. 163, n. (*i*).

(*m*) See *In Estate of Bryan*, [1907] P. 125, and the cases on additional and substituted legacies cited *post*, pp. 1094 *et seq.*

(*n*) *Follett* v. *Pettman*, 23 Ch. D. 337.

(*o*) 33 T. L. R. 389.

(*p*) First edition, p. 157.

(*q*) 3 Mod. 206, Litt. s. 168; *Re Hough's Estate*, 20 L. J. Ch. 422; *Evans* v. *Evans*, 17 Sim. 107; *Wallace* v. *Seymour*, Ir. R. 6 C. L. 343; *Baker* v. *Story*, 23 W. R. 147; *In b. Hodgkinson*, [1893] P. 339.

several distinct wills, the greater anxiety evinced to reconcile the several parts of the same testamentary paper, than to reconcile several distinct papers of different dates, though constituting, in the whole, one will. In the former case the devisees (as hereafter shown) take concurrently in order to avoid making one part of the will contradict and subvert another; and in the latter case, no hesitation seems to have been felt in holding the second devise to be revocatory of the first. And the distinction seems to be reasonable; for though it may be very unlikely that a testator should wholly change the object of the devise in the short interval between his passing from one part of the will to the other, there is no such improbability that, in the longer lapse of time between the execution of two testamentary papers of different dates, such a change of purpose should have occurred."

Gift of residue by will revoked by similar gift in codicil.

So if the residue of personal estate be given by will to A, and by codicil to B, the former gift is revoked (*r*). And this was so held in *Earl of Hardwicke* v. *Douglas* (*s*), though the gift by codicil was of personal estate "not hereinbefore or by my will or any other codicil disposed of." The words were construed to mean "not hereinbefore or by my will disposed of by way of particular legacies," thus leaving something for the gift to operate upon: literally construed they left nothing. Again, in *Kermode* v. *Macdonald* (*t*), a testatrix by her will bequeathed specific and pecuniary legacies, and directed that in case her personal estate proved insufficient for the payment of the legacies, the deficiency should be made up out of her real estate, and gave the residue of her personal estate to A; by a codicil she gave "all my personal estate" to B; it was held, that "all my personal estate" meant the whole of the personal estate which by her will the testatrix had divided into two portions, the legacies and the residue, and that the specific legacies were therefore wholly revoked, but that the charge of the pecuniary legacies on the real estate was not revoked, and that they were payable out of it accordingly.

A testamentary instrument may be impliedly revoked by a later one which is substantially or in great part a repetition of it (*u*).

If a testator appoints A his executor, and bequeaths him a

(*r*) *Fownes-Luttrell* v. *Clarke*, [1876] W. N. 168, 249. See *Beamish* v. *Beamish*, 1 L. R. Ir. 501. In *Thorn* v. *Dickens*, [1906] W. N. 54, a will and codicil were held to be revoked by a duly attested document containing only the words, "All for mother."

(*s*) 7 Cl. & Fin. 795; West, H. L. 555; *Re Pereira*, 56 Sol. J. 614; *Re Stoodley*, [1916] 1 Ch. 242. Compare *Lee* v. *Delane*, 4 De G. & S. 1.

(*t*) L. R. 1 Eq. 457, 3 Ch. 584.

(*u*) *Chichester* v. *Quartrefages*, [1895] P. 186.

Legacy to executor.

legacy on condition that he proves the will, and by codicil revokes the appointment of A as executor, this carries with it the revocation of the legacy (*x*). But this result would not follow if the legacy were given to A independently of the office of executor (*y*).

Gift of particular residue not revoked by codicil giving the general residue.

But where a testator bequeathed portions of "his money in the funds" to several legatees, and "the surplus of his money in the funds" to be distributed by his executors among the legatees, and then by codicil, after bequeathing some specific chattels, gave "the surplus remaining after the aforesaid legacies are paid" to the children of A; Sir J. K. Bruce, V.-C., held that the gift of surplus money in the funds was not revoked by the residuary gift contained in the codicil, which was so expressed as to embrace other property (*z*).

As to contradictory wills of uncertain date.

"If," says Mr. Jarman (*a*), "from the absence of date and of every other kind of evidence, it is impossible to ascertain the relative chronological position of two conflicting wills, both are necessarily held to be void, and the heir as to the realty, and the next-of-kin as to the personalty, are let in; but this unsatisfactory expedient is never resorted to until all attempts to educe from the several papers a scheme of disposition consistent with both have been tried in vain (*b*). And even where the times of the actual execution of the respective papers are known, so that if they are inconsistent, there can be no difficulty in determining which is to be preferred, the Court will, if possible, adopt such a construction as will give effect to both, sacrificing the earlier so far only as it is clearly irreconcilable with the latter paper (*c*); supposing, of course, that such latter paper contains no express clause of revocation.

Inconsistent wills always to be reconciled if possible,

"As where a testator made a will devising his lands to trustees, for two hundred years, to pay his debts, and afterwards, by another will, devised the same lands to other trustees for three hundred years, to discharge some particular specialty debts mentioned in a deed executed after the first will, and all incumbrances affecting the property; Lord Talbot held, that the first term of two hundred years was not revoked, as the two

(*x*) *Walne* v. *Hill*, [1883] W. N. 171; *Re Russell*, 56 Sol. J. 651. See also *Re Mellor*, 56 Sol. J. 596 (substituted trustee).

(*y*) See *Burgess* v. *Burgess*, 1 Coll. 367, and other cases, *post*, pp. 1597 *seq.*

(*z*) *Inglefield* v. *Coghlan*, 2 Coll. 247.

(*a*) First edition, p. 159.

(*b*) See *Phipps* v. *Earl of Anglesey*, 7 Br. P. C. 443. In *Loftus* v. *Stoney*, 17 Ir. Ch. 178, and *Townsend* v. *Moore*, [1905] P. 66, it appeared from the evidence that the two papers were executed at the same time, *post*, p. 163.

(*c*) *Richards* v. *Queen's Proctor*, 18 Jur. 540; *In b. Hartley*, 50 L. J. P. 1; *Lemage* v. *Goodban*, L. R. 1 P. & D. 57; *Simpson* v. *Foxon*, [1907] P. 54; *Reeves* v. *Reeves*, [1909] 2 Ir. R. 521.

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terms were not inconsistent, the testator's intention in creating the term of three hundred years being merely for the purpose of giving priority in payment to the specialty debts, and the charges affecting the estate (*d*).

—provided that the subsequent document is a codicil, or an incomplete will.

"The inclination to such a construction as would preserve, either wholly or in part, the contents of the prior document, however, exists only, either when the subsequent document is inadequate to the disposition of the entire property, so that the consequence of rejecting the prior document would be to produce partial intestacy (*e*); or else where the posterior paper is styled a codicil (*f*); for the office of a codicil being to vary or add to and not wholly supplant a previous will, such a designation of the instrument seems to demand that some part, at least, of the will, whose existence it supposes and recognises, should, if possible, be sustained."

Where it is not.

If the subsequent instrument does not profess to be a codicil, and is adequate to the disposition of the entire property, there is no such *a priori* improbability that it was intended wholly to supplant the prior instrument. The case then rests on the true construction of the contents of the two instruments, and the complete disposition contained in the second must, unless controlled by the context, wholly revoke the first. Thus, in *Henfrey* v. *Henfrey* (*g*), where a testator by will gave his household effects and other benefits to his wife, and all the residue of his estate and effects to A, and appointed him executor, and then by subsequent will left all he possessed "containing furniture, books, etc.," to his wife, but did not appoint an executor, the first will, including the appointment of the

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(*d*) *Weld* v. *Acton*, 2 Eq. Ca. Ab. 777, pl. 26. The word "deed," occurring four times in this report, seems a mistake for "will," though the report might be made consistent by reading "demise" for "devise"; and see *Coward* v. *Marshal*, Cro. El. 721.

(*e*) See *Freeman* v. *Freeman*, Kay, 479, 5 D. M. & G. 704; *In b. Hartley*, 50 L. J. P. 1; in *Plenty* v. *West*, 9 Jur. 458, Sir H. J. Fust would not, even in such cases, recognise the existence of the inclination as regards personalty; but see *Cookson* v. *Hancock*, 1 Kee. 817, 2 My. & Cr. 606; *Lemage* v. *Goodban*, L. R. 1 P. & D. 57; *Birks* v. *Birks*, 34 L. J. P. 90.

(*f*) *In b. Howard*, L. R. 1 P. & D. 636; *Robertson* v. *Powell*, 2 H. & C. 762; *Re Wood*, 83 L. T. 157.

(*g*) 2 Curt. 468, Moo. P. C. C. 29, 6 Jur. 355. And see *Cottrell* v. *Cottrell*, L. R. 2 P. & D. 397; *In b. Tenney*, 45 L. T. 78; *In b. Turnour*, 56 L. T. 671; *In b. Palmer*, 58 L. J. P. 44; *Pepper* v. *Pepper*, Ir. R. 5 Eq. 85; *O'Leary* v. *Douglass*, 3 L. R. Ir. 323; *In b. Macfarlane*, 13 L. R. Ir. 264; *M'Ara* v. *M'Cay*, 23 L. R. Ir. 138. In the last case the second will could not be found, and parol evidence of its contents was admitted. By the civil law the appointment of an executor was a complete disposition of the personal estate; and in some early cases in the Ecclesiastical Courts the mere appointment of a different executor in a subsequent paper, purporting to be a distinct will, was held to be a revocation of a prior will and appointment. *Whitehead* v. *Jennings* and *Burt* v. *Burt*, cit. 1 Phillim. 412. But such new appointment was afterwards decided not to be conclusive: *Richards* v. *Queen's Proctor*, 18 Jur. 540; *Birks* v. *Birks*, 34 L. J. P. 90.

executor, was held to be wholly revoked. "Containing" was read "inclusive of."

Tenour of later will showing intention to revoke.

And a will may revoke an earlier testamentary document, disposing of the whole of the testator's property, even although the later will does not contain an express clause of revocation, and does not dispose of all the testator's property. It is a question of construction on the terms of the two documents (*h*).

Extrinsic evidence.

If the intention remain in doubt on the face of the documents themselves, extrinsic evidence of the surrounding circumstances and of the testator's intention to revoke the earlier will is admissible (*i*).

Appointment under power.

A testamentary appointment under a power, and a subsequent will not referring to it, may be taken as together containing the last will of the deceased (*k*). The question of the revocation of appointments under powers is considered more in detail in another chapter (*l*).

Inconsistent codicils.

The general principle above stated applies to codicils which are inconsistent *inter se*. Instances occur where a codicil is impliedly revoked by a later codicil, the latter being clearly intended by the testator to take the place of the earlier codicil (*m*).

The case of *Townsend* v. *Moore* (*n*), is an instance of the reluctance of the Court to refuse probate to two inconsistent testamentary papers (*o*). There the testatrix executed, on the same day and practically simultaneously, two codicils, the terms of which were in some respects identical, and in other respects inconsistent: it was held (by Vaughan Williams and Romer, L.JJ., Cozens-Hardy, L.J., doubting) that the two codicils were not so inconsistent that they could not stand together, and that both ought to be admitted to probate (*p*).

Where second will is inoperative.

In *Baker* v. *Story* (*q*) a testator made two wills disposing of his real estate, which were so inconsistent that the second operated as a total revocation of the first, but the ultimate

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(*h*) *Plenty* v. *West*, 6 C. B. 201, 16 Bea. 173; *Dempsey* v. *Lawson*, 2 P. D. 98; *In Estate of Bryan*, [1907] P. 125.

(*i*) *Jenner* v. *Ffinch*, 5 P. D. 106 (citing *Thorne* v. *Rooke*, 2 Curt. 799, and *Methuen* v. *Methuen*, 2 Phillim. 416, cases before the Wills Act); *In b. Bryan*, [1907] P. 125.

(*k*) *In b. Fenwick*, L. R. 1 P. & D. 319. See *Re Gibbes*, 37 Ch. D. 143; *Cadell* v. *Wilcocks*, [1898] P. 21; *Kent* v. *Kent*, [1902] P. 108.

(*l*) Chap. XXIII, *post*, p. 811.

(*m*) *Chichester* v. *Quartrefages*, [1895] P. 186.

(*n*) [1905] P. 66; followed in *Reeves* v. *Reeves*, [1909] 2 Ir. R. 521.

(*o*) *Ante*, p. 161.

(*p*) See *Loftus* v. *Stoney*, 17 Ir. Ch. 178, where both wills were proved, but the Court of Construction held that one will was the real will, because it was described as the "last" will, while the other was marked "duplicate."

(*q*) 23 W. R. 147.

devise in the second will failed, being void under the Mortmain Acts; it was contended that the devise in the first will took effect, but Jessel, M.R., decided against this contention. But if a codicil does not operate as a total revocation of the will, it seems that the will stands, except so far as the dispositions contained in the codicil are effective (*r*).

Whether re-execution of will revokes codicil.

The question, whether the re-execution of a will revokes a codicil to that will, is discussed in the next chapter (*s*).

VIII.—Will not Disturbed further than is Necessary.—"Numerous are the questions," as Mr. Jarman points out (*t*), "which have arisen in regard to the extent to which a codicil affects the dispositions of a will or antecedent codicil, and which are commonly occasioned by the person framing the codicil not having an accurate knowledge or recollection of the contents of the prior testamentary paper.

Codicil not to disturb will more than absolutely necessary.

"In dealing with such cases it is an established rule not to disturb the dispositions of the will further than is absolutely necessary for the purpose of giving effect to the codicil, as will appear from the following adjudications, which have been selected from a large mass of cases (*u*), that might be cited in illustration of the principle.

Examples of non-revocation by codicil.

"Thus, where a testator by his will devises lands to A in fee, and by a codicil devises the same lands in fee to the first son of B who shall attain the age of twenty-one years and shall assume the testator's name, the first devise will be revoked only *quoad* the interest comprised in the executory devise in the codicil; so that, until B has a son who attains his majority and assumes the

(*r*) See *Re Fleetwood*, 15 Ch. D. 594 (at p. 609), where however Hall, V.-C., misapprehended the decision in *Onions* v. *Tyrer* (*ante*, p. 156). See also *Morley* v. *Rennoldson*, [1895] 1 Ch. 449; *post*, p. 167.

(*s*) Page 182. (*t*) First edition, p. 160.

(*u*) Cases as to the combined effect of a will and several codicils are frequently not only very long, but are too special to be of much use as general authorities: *Doe* d. *Hearle* v. *Hicks*, 8 Bing. 475, 1 Cl. & Fin. 20; *Hicks* v. *Doe*, 1 You. & J. 470; *Alexander* v. *Alexander*, 2 Jur. (N.S.) 898, 6 D. M. & G. 593; *Agnew* v. *Pope*, 1 De G. &. J. 49; *Patch* v. *Graves*, 3 Drew, 348; *Barclay* v. *Maskelyne*, Johns. 124; *Farrer* v. *St. Catharine's Coll., Cambridge*, L. R. 16 Eq. 19; *Vencatanarayana Pillay* v. *Subammal*, 32 T. L. R. 118. The question, whether a codicil was wholly or partially revocatory, was much discussed in *Cookson* v. *Hancock*, 1 Kee. 817, 2 My. & C. 606; see also *Schofield* v. *Cahuac*, 4 De G. & S. 533; *Lord Lovat* v. *Duchess of Leeds*, 2 Dr. & Sm. 62; *Re Margitson;* 30 W. R. 920; 31 W. R. 257; *Wallace* v. *Seymour*, Ir. R. 6 C. L. 343; *Beamish* v. *Beamish*, 1 L. R. Ir. 501; *Re Howell-Shepherd*, [1894] 3 Ch. 649. Where the residue was given to executors by will, and a codicil directed that A should also be executor, and that the will should take effect as if his name had been inserted therein as executor, A was held not entitled to a share of residue: *Hillersdon* v. *Grove*, 21 Bea. 518; and see *Gibson's Trusts*, 2 J. & H. 656; stated *post*, p. 172. See also *Hordern* v. *Hordern*, [1909] A. C. 210, and *Re Freeman*, [1910] 1 Ch. 681, where *Randfield* v. *Randfield*, 8 H. L. C. 225, is cited, but that case relates to contradictory gifts in the same instrument: *Re Bund*, [1929] W. N. 162.

testator's name, the property will pass to A under the devise in the will" (*x*).

So, where a testator devises lands to A subject to a charge in favour of B, and then by a codicil revokes the devise to A of the land which he gives to another, without noticing the charge, the land remains subject to the charge in the hands of the substituted devisee (*y*). Again, if a testator bequeaths a legacy payable out of two funds, and by codicil there is an absolute gift of one of the funds, but no express revocation of the legacy, it remains payable out of the other fund; and this is so, even if the fund thus taken away is the general personal estate (*z*).

Charge not revoked.

A codicil revoking a will does not necessarily revoke a prior codicil (*a*).

Where a testator by his will specifically devised certain real estate, and by a codicil directed that it should be sold, this was held not to deprive the devisees of their beneficial interests (*b*).

Gift not revoked by direction to sell,

So where a testator by his will devised his estates to C B for life without impeachment of waste, and by a codicil directed his trustees to let, until the tenant for life married, the lessees to be impeachable of waste, and the rents to be accumulated and laid out in lands to be settled to the same uses; it was contended that this was inconsistent with, and therefore revoked, the devise for life without impeachment of waste; but Sir W. Grant, M.R., held that there was no inconsistency, and nothing to take the timber from the tenant for life (*c*).

—or let.

Again, where a testator by his will bequeathed as follows: "As to my leasehold house in S., and my household goods and furniture there and at S., and as to all my plate, linen, china-ware, pictures, live and dead stock, and all the rest and residue of my goods, chattels, and personal estate," he gave the same to A. By a codicil he revoked the bequest of the residue of his

General expression in codicil confined to its meaning in the will.

(*x*) *Duffield* v. *Duffield*, 3 Bli. (N.S.) 260; 1 D. & Cl. 268, 395, Sug. Law of Prop. 216; and see *Doe* d. *Evers* v. *Ward*, 16 Jur. 709, 21 L. J. Q. B. 145; *Re Colshead*, 2 De G. & J. 690; *Norman* v. *Kynaston*, 29 Bea. 96, 3 D. F. & J. 29, with which compare *Nevill* v. *Boddam*, 28 Bea. 554, where there was an express clause of revocation.

(*y*) This sentence is quoted with approval by Barton, J., in *Lucas* v. *Lucas*, [1910] 1 Ir. R. 353, at p. 356. *Beckett* v. *Harden*, 4 M. & Sel. 1; *Young* v. *Hassard*, 1 Dr. & War. 638; *Fry* v. *Fry*, 9 Jur. 894; and compare *Ravens* v. *Taylor*, 4 Bea. 425.

(*z*) *Buckridge* v. *Ingram*, 2 Ves. jun. 652; *Sheddon* v. *Goodrich*, 8 Ves. 481; *Tatlock* v. *Jenkins*, Kay, 654; *Kermode* v. *Macdonald*, L. R. 3 Ch. 584, stated *ante*, p. 160. *Leese* v. *Knight*, 12 W. R. 1097, seems to be to the same effect. The original gift may of course be so expressed that the codicil operates as an implied revocation of the legacy: *Grice* v. *Funnell*, 1 Sm. & G. 130.

(*a*) *Farrer* v. *St. Catharine's College*, L. R. 16 Eq. 19. See *Stretton* v. *Fitzgerald*, 23 L. R. Ir. 310, 466.

(*b*) *Re Chifferiel*, 73 L. T. 53.

(*c*) *Lushington* v. *Boldero*, G. Coop. 216. See also *Green* v. *Britten*, 1 D. J. & S. 649; *Re Wood*, 83 L. T. 157.

personal estate to A, and gave the same to B. It was held, that the revocation was confined to the "residue," and did not extend to either the leasehold house and furniture, or the other enumerated articles, namely, the plate, etc. (*d*). So the operation of a codicil, which revokes a legacy or devise in favour of a certain person, may be restrained by a recital in the codicil (*e*). And where by his will a testator devised tithes, and then devised all his real estates of what nature or kind soever, and by codicil devised in a different manner all his real estates of what nature or kind soever, Sir L. Shadwell, V.-C., held that the second gift in the will did not, but that the gift in the codicil did, include the tithes; the Court of Q. B., however, differed from him on the last point, holding that the words "real estates" in the codicil were to be interpreted in the same manner as in the will (*f*).

Gift in codicil "instead of" gift in will.

Again, in *Doe* d. *Murch* v. *Marchant* (*g*), where by will an estate was devised to A in fee, and by codicil "instead of" that devise the estate was given to A for life, with alternative contingent remainders to her children and her collateral relations, which failed; A was held entitled to the fee; "instead of the devise in the will" being read "instead of so much of it only as was incompatible with the codicil," and the codicil not disposing of the ultimate fee. And where a trust fund, which by will was given to the children of A living at a stated period, with a power of advancement in the trustees, was by codicil, "in lieu of such disposition," given to the children of A living at a different period, and in other respects the will was confirmed; it was held that the power of advancement was not revoked (*h*). But though the expression "instead of" need not mean total substitution, it naturally implies some substitution; as was held—still in favour of non-revocation—in *Barclay* v. *Maskelyne* (*i*), where the will gave legacies to the six children of A, naming them, and the codicil revoked the legacies "to the children of A, and in lieu thereof" gave a sum amongst "the children of A, to wit" (naming five of them); and it was held that the legacy to the sixth was not revoked, because nothing was substituted for her.

Specific gift in will not revoked by general gift in codicil.

Again, in *Re Arrowsmith's Trust* (*k*), where by will a testator bequeathed a specific fund to his nephews and nieces, and after

(*d*) *Clarke* v. *Butler*, 1 Mer. 304. See also *Barclay* v. *Maskelyne*, 5 Jur. (N.S.) 12; *Hinchcliffe* v. *Hinchcliffe*, 2 Dr. & Sm. 96; *Beamish* v. *Beamish*, 1 L. R. Ir. 501.

(*e*) *Re Percival*, 59 L. T. 21; *Hinchcliffe* v. *Hinchcliffe*, 2 Dr. & Sm. 96.

(*f*) *Evans* v. *Evans*, 17 Sim. 86; *Williams* v. *Evans*, 1 Ell. & Bl. 727.

(*g*) 6 M. & Gr. 813, 7 Scott, N. R. 644. It was followed in *Re Wilcock*, [1898] 1 Ch. 95.

(*h*) *Hill* v. *Walker*, 4 K. & J. 168. See also *Butler* v. *Greenwood*, 22 Bea. 303.

(*i*) 5 Jur. (N.S.) 12.

(*k*) 2 D. F. & J. 474. Compare *Kermode* v. *Macdonald*, *ante*, p. 160.

the death of his wife gave them all his remaining property; he then by codicil bequeathed certain legacies (one of them to be paid at his wife's death), and gave "all his real and personal estate" to his wife for her life: it was held that the specific gift to the nephews and nieces was not disturbed, and that the codicil was meant only to remove the doubt which might arise on the will whether the wife was to take the residue for life.

Intention of testator.

The presumption against implied revocation is strengthened if the testator uses words showing an intention not to alter his testamentary dispositions except in certain specific respects (*l*).

Ineffectual gift in codicil.

It sometimes happens that the provisions of the codicil are contrary to law, with the result that the provisions of the will take effect. Thus in *Morley* v. *Rennoldson* (*m*), a testator gave property in trust for his daughter A for life with remainder to her children; by a codicil he expressed his will to be that A should not marry, and in case of her marriage or death he gave the property over; she married and died, leaving children; it was held that the will and codicil must be construed together, and that as the condition against her marrying was void, the children were entitled.

The provisions of a codicil may have the effect of removing an ambiguity which appears on the face of the will (*n*).

Revocation of part of gift may revoke whole.

Sometimes the express revocation of one gift operates to revoke another, if the two are so closely connected as practically to constitute one gift (*o*). A testator gave an annuity of £300 to A, and after her death to her children as she should appoint, and in default of appointment among her children equally; by a codicil reciting that he had devised to A an annuity of £300, he revoked the devise of the said annuity and "instead thereof" he devised to A an annuity of £150, to be payable and charged in the same manner as the said annuity of £300: it was held that the annuity to the children of A was also reduced to £150 (*p*).

Series of limitations whether revoked wholly

It frequently happens that a testator by his will gives property to persons in succession, and by a codicil revokes the gift in such a way as to make it doubtful whether he means to revoke it altogether, or only in part (*q*). Thus in *Sanford* v. *Sanford* (*r*), a

(*l*) See *Alt* v. *Gregory*, 8 D. M. & G. 221; *Follett* v. *Pettman*, 23 Ch. D. 337.

(*m*) [1895] 1 Ch. 449.

(*n*) *Re Venn*, [1904] W. N. 94.

(*o*) See *Grice* v. *Funnell*, 1 Sm. & G. 130, *ante*, p. 165, n. (*z*).

(*p*) *Re Freme's Contract*, [1895] 2 Ch. 778. Rigby, L.J., dissented.

(*q*) *Philipps* v. *Allen*, 7 Sim. 446, was a clear case of revocation *in toto*. Compare *Murray* v. *Johnston*, 3 Dr. & W. 143; *Fry* v. *Fry*, 9 Jur. 894; *Re Jermingham Trusts*, [1922] 1 Ir. R. 115 (estate tail). In many cases the construction is assisted or controlled by the fact that the codicil contains a complete substituted gift: *Daly* v. *Daly*, 2 J. & Lat. 752; *Wells* v. *Wells*, 17 Jur. 1020. As to whether a substituted legacy is subject to the same qualifications as the original legacy, see Chap. XXX, pp. 1095 *et seq.*

(*r*) 1 De G. & S. 67.

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testatrix bequeathed £3,000 in trust for C for life, and after her death for her children, and in case there should be no such children in trust for P; by a codicil, stating that C had been largely provided for from other sources, the testatrix deducted the sum of £2,900 from the legacy of £3,000, and revoked so much of the legacy accordingly "leaving her the sum of £100 only, as a remembrance of my affection and regard for her": it was held that the legacy of £3,000 was revoked *in toto*, and that in lieu of it, C took £100 absolutely. So if there is a gift to A with a gift over to B, in the event of A dying under a certain age, or the like, a revocation by codicil of all gifts in the will to A is *prima facie* a revocation also of the gift over to B (*s*). On the other hand, if the language of the codicil is restricted, its effect may be to revoke only part of the limitations, and leave the rest in force. As where the gift is revoked "so far as relates to" one of the persons to whom the property is given in succession (*t*). In *Re Whitehorne* (*u*) a testator gave a share of real estate to G for life, and after his death to his children in fee simple; by a codicil he revoked every gift in his will to or for the benefit of G, and directed that his will should take effect as if the name of G had never appeared therein: it was held by Buckley, J. (following *Alt* v. *Gregory* (*x*), and *Green* v. *Tribe* (*y*), and distinguishing *Tabor* v. *Prentice* (*z*)), that the revocation extended only to the benefits given to G, and that the interests of his children were accelerated.

—or only partially.

Case where held change of trustee merely and no revocation of trusts.

Where a testator directed his trustees, to whom he had given all his property, to carry on his business for ten years, and then to sell and hold the proceeds upon trust, as to one moiety for his daughter and her children, and as to the other moiety for the children of his son, and by a codicil revoked that part of his will which empowered his trustees to sell, and instead thereof authorised his daughter to take possession of his property and to dispose thereof at her discretion: it was held, that this was not an absolute gift to the daughter, but only constituted her a trustee in place of the trustee named in the will (*a*).

Legacy to executor.

Where a testator by his will appoints an executor, and

(*s*) *Boulcott* v. *Boulcott*, 2 Dr. 25. In *M'Kay* v. *M'Kay*, [1901] 1 Ir. R. 109, the question did not arise, as the gift over would not have taken effect even if the gift to A had not been revoked.

(*t*) *Ives* v. *Ives*, 4 Y. & C. 34.

(*u*) [1906] 2 Ch. 121.

(*x*) 8 D. M. & G. 221.

(*y*) 27 W. R. 39.

(*z*) 32 W. R. 872.

(*a*) *Newman* v. *Lade*, 1 Y. & C. C. C. 680; and see *Barry* v. *Crundall*, 7 Sim. 430; *Froggatt* v. *Wardell*, 3 De G. & S. 685; and compare *Schofield* v. *Cahuac*, 4 De G. & S. 533.

bequeaths to him a legacy in such a way that it is annexed to the office (*b*), and by a codicil revokes the appointment of executor, the legacy is also revoked (*c*). But if the testator shows that the bequest of the legacy is independent of the office—as where he bequeaths it as a "mark of respect" (*d*), or "as a remembrance" (*e*),—the legacy is not revoked by the revocation of the office.

Appointment of executor, when revoked.

Where there are several testamentary papers not inconsistent with one another, each of which appoints different executors, probate will be granted to all (*f*), and this may be done even if the executor appointed by the last paper is described as "sole executor" (*g*). And a reappointment by codicil of some of the executors appointed by the will together with new executors, does not revoke the appointment of executors contained in the will (*h*). But if a testator by his will appoints A and B his executors, and by a codicil to his "said will" appoints X "sole executor of this my said will," it seems that this is an implied revocation of the appointment of A and B (*i*).

Revocation of devise to trustee.

If a testator by his will appoints a person trustee and devises land to him upon trust, and by codicial appoints another person to be trustee in his place, this is a revocation of the devise as well as of the appointment (*k*).

Revocation as to one office does not extend to other offices.

Where a person is appointed to more than one of the offices of guardian, executor, and trustee, a revocation by codicil of his appointment to one of the offices is not a revocation of the appointment to any other office (*l*); unless the context shows, as by directing "trustees" to pay debts and legacies, that the several offices (of trustee and executor) are to be filled by the same persons (*m*).

Revocation of devise by reference.

"It may be observed," says Mr. Jarman (*n*), "that where a testator, in order to avoid repetition, has by his will declared his intention respecting a property (say Whiteacre), then being devised by him, to be similar to what he had before expressed concerning another property (say Blackacre) antecedently given,

(*b*) As it is generally presumed to be: *Re Appleton*, 29 Ch. D. 893.
(*c*) See *Walne* v. *Hill*, [1883] W. N. 171; *Re Russell*, 56 Sol. J. 651.
(*d*) *Burgess* v. *Burgess*, 1 Coll. 367.
(*e*) *Bubb* v. *Yelverton*, L. R. 13 Eq. 131.
(*f*) *In b. Graham*, 32 L. J. P. 113.
(*g*) *In b. Morgan*, L. R. 1 P. & D. 323; *Geaves* v. *Price*, 32 L. J. P. 113.
(*h*) *In b. Leese*, 31 L. J. P. 169; *In b. Lloyd*, Ir. R. 6 Eq. 348.
(*i*) *In b. Lowe*, 33 L. J. P. 155; *In b. Bailey*, L. R. 1 P. & D. 628.
(*k*) *Re Hough's Will*, 4 De G. & S. 371; *Re Turner*, 2 D. F. & J. 527.
(*l*) *Re Park*, 14 Sim. 89; *Fry* v. *Fry*, 9 Jur. 894; *Graham* v. *Graham*, 16 Bea. 550; *Cartwright* v. *Shepheard*, 17 Bea. 301; *Worley* v. *Worley*, 18 Bea. 58; and see *Hare* v. *Hare*, 5 Bea. 629.
(*m*) *Barrett* v. *Wilkins*, 5 Jur. (N.S.) 687.
(*n*) First edition, p. 162.

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and he afterwards by a codicil, or by obliteration, or otherwise, revokes the devise of Blackacre, such revocation does not affect the devise of Whiteacre. Thus, in the case of *Darley* v. *Langworthy* (*o*), where a testator by his will devised a certain estate to certain limitations, and then proceeded to annex thereto another estate, declaring that the same should go unto and be enjoyed by the possessor of the other estate, and not be separated therefrom, and subsequently, by an act in his lifetime, he revoked the devise of the principal estate, the property so annexed was held not to be affected, but went according to the uses declared of the principal estate by the will."

Copyholds and leaseholds.

In *Martineau* v. *Briggs* (*p*), a testator devised freehold estates to certain uses, and gave his copyhold and leasehold estates upon trusts to correspond with the uses of the freeholds. By a codicil he devised the freeholds to other uses, but made no mention of the copyholds and leaseholds : it was held by the House of Lords that the copyholds and leaseholds passed according to the trusts declared by the will.

Money to be applied in purchase of lands.

In *Bridges* v. *Strachan* (*q*), the testator devised freeholds to certain uses and bequeathed £3,000 to trustees to purchase lands to be settled to the same uses. By a codicil he revoked the devise of the freeholds and devised them to other uses, without referring to the £3,000 : it was held by Malins, V.-C., that the £3,000 passed under the will in the same way as if the codicil had not been made.

Bequest by reference.

So, where a testator by his will bequeathed a specific fund to his residuary legatee after named, and then bequeathed the residue to A, and by a codicil revoked the bequest of the residue, it was held that this was no revocation of the specific bequest (*r*). And where a testator bequeathed several pecuniary legacies, including one to A, and the residue to his before-mentioned legatees in proportion to their pecuniary legacies; and by codicil executed after A's death gave A's pecuniary legacy to B, but was silent as to the residue : it was held that B was not entitled to A's share of residue (*s*).

Mixed fund.

Again, where a testator by his will devised certain freehold property (on failure of the objects of a preceding devise) to trustees to be sold, and directed the produce to be applied upon

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(*o*) 3 Br. P. C. 359; *Re Whitburn*, [1923] 1 Ch. 332 (chattels) : see also *Lord Sidney Beauclerk* v. *Mead*, 2 Atk. 167; *Salter* v. *Farey*, 12 L. J. Ch. 411.

(*p*) 23 W. R. 889.

(*q*) 8 Ch. D. 558.

(*r*) *Roach* v. *Haynes*, 6 Ves. 153.

(*s*) *Re Gibson's Trusts*, 2 J. & H. 656; *Re Florence*, 117 L. T. 701, where the residue was given in proportion to certain legacies, some of which were afterwards revoked

the trusts thereinafter expressed concerning his residuary personal estate; he then bequeathed his residuary personal estate upon certain trusts, and afterwards by a codicil duly attested for devising freehold estates, revoked the residuary bequest, and disposed of the personalty in a different manner: Sir J. Leach, M.R., held, that by this alteration in the disposition of the personal estate, the devise of the realty was not affected; the effect being the same as if the testator had in terms applied the trusts in question to the produce of the freehold estate, in which case it is obvious that the revocation by the codicil of the residuary gift of the personal estate by the will would have been no revocation of the disposition of the produce of the freehold estate; and his Honour observed, it could make no difference in principle that the testator saves himself the trouble of repeating those trusts, intents, and purposes, by compendious words of reference (*t*).

Where rule does not apply.

This construction, however, does not apply where personalty is given as an incident or accessory to real estate (*u*).

Distinction, where the first devise is modified only.

Mr. Jarman continues (*x*): "If the devise of the principal estate is not simply revoked, but is modified only, it is not too hastily to be concluded that the construction adopted in the class of cases just stated would apply, however forcibly the reasoning in some of them, and especially that of the Master of the Rolls in [*Francis* v. *Collier*] might seem to conduct to such a conclusion; for a different construction prevailed in the case of *Lord Carrington* v *Payne* (*y*), where a testator devised his real estate to trustees to be conveyed to certain uses, and bequeathed personal estate to be laid out in land to be settled to such uses and upon such trusts, etc., as he had declared concerning his real estate. By a codicil he revoked so much of his will as directed the settlement of his real estate to those limitations, and devised it to other limitations, the effect being merely to change the order in which some of the devisees were to take. Sir R. P. Arden, M.R., held, that the bequest of the personalty was not revoked. He considered that though the devisor had used the expression "revoke," yet the codicil was not a revocation as to the union of the estates, but merely an alteration in the order of the limitations to be inserted in the settlement (of

(*t*) *Francis* v. *Collier*, 4 Russ. 331.

(*u*) *Evans* v. *Evans*, 17 Sim. 108 (chattels directed to be enjoyed by persons entitled to real estate "under or by virtue of the limitations of this my will," held to pass to persons entitled to the real estate under a codicil). See also *Whiteway* v. *Fisher*, 9 W. R. 433, where a fund was given for the benefit of the devisees of certain real estate, which was sold by the testatrix during her lifetime; the case therefore fell within the principle of ademption.

(*x*) First edition, p. 163.

(*y*) 5 Ves. 404.

both properties); and that it was no more than if the devisor had with his own hand inserted the name of one devisee before another, and then republished his will."

The case of *Lord Carrington* v. *Payne* was referred to by Lord Hatherley in *Re Gibson's Trusts* (*z*), where his lordship pointed out that the ground of the decision was that if there is on the face of the will a sufficient indication of intention to unite two sets of estates, one only of which is referred to in the limitations contained in the will, and altered by the codicil, the intention to unite not being altered or revoked, that intention must be carried into effect as far as possible, though in terms the codicil only refers to one set of estates, and not to the other. And in a later case the decision in *Lord Carrington* v. *Payne* was referred to the same principle, and followed by the Court of Appeal (*a*). In that case the testator devised his H. Lodge estate to certain persons in succession and then gave some heirlooms and a sum of money upon trust "for the person or persons for the time being entitled to the H. Lodge estate under the devise thereof, hereinbefore contained." There was a power to lease H. Lodge with the heirlooms. By a codicil the testator altered the devolution of the H. Lodge estate. It was held by the Court of Appeal (reversing Stirling, J.) that it appeared from the language of the will, and especially from the power of leasing, that the testator intended to unite the possession of the estate with the enjoyment of the personalty.

In *Liddell* v. *Liddell* (*b*), the testator devised real estate upon trust for his nephews and their issue male in succession according to seniority, and directed his personal estate to be held upon such trusts as would best correspond with the trusts of the real estate. By a codicil the testator gave his wife power to alter the order of succession between the nephews, which she did. It was held by the House of Lords that the personal estate devolved in the order of succession as altered by the wife.

The case of *Holder* v. *Howell* (*c*), which is referred to by Mr. Jarman in connection with the case of *Lord Carrington* v. *Payne*, is stated elsewhere (*d*).

Clear gift in will not revoked by doubtful expressions in codicil.

IX.—Ambiguous and informal Expressions will not revoke a clear Gift.—Another principle of construction is, that where the will contains a clear and unambiguous disposition of property,

(*z*) 2 J. & H. 656.
(*a*) *Re Towry*, 41 Ch. D. 64.
(*b*) 74 L. T. 105.
(*c*) 8 Ves. 97.
(*d*) *Post*, p. 567.

real or personal, such a gift is not allowed to be revoked by doubtful expressions in a codicil. "The principle is perfectly clear, that where you have a distinct disposition made by a will, that disposition cannot be revoked by a codicil except through the medium and use of words equally distinct" (*e*).

The principle is illustrated by numerous cases.

Thus, in *Goblet* v. *Beechey* (*f*), a testator by his will gave a specific chattel to A; afterwards by a codicil he gave a number of articles of a different kind, and of much less value, to B, and in enumerating those articles introduced an imperfectly written word, which might be supposed to designate the chattel previously given to A: it was held that the bequest to A was not thereby revoked.

In *Bunny* v. *Bunny* (*g*), a testatrix by her will gave to the seven children of J. B. a legacy of £200 each, and other interests; by a first codicil she revoked the legacies of £200 each to the children of J. B. and all other benefits given them by her will, and in lieu thereof gave only the legacy of £200 each to A, B, C, D, and E, five of the children of J. B. By a second codicil she revoked all the legacies she had left in her will to J. B.'s children; and by a third codicil she revoked the legacy of £200 by a previous codicil to her said will given to A. The question was, whether the legacies given by the first codicil to the plaintiffs B, C, D, and E were revoked by the second codicil; which depended on what the testatrix meant by the word "will" in the second codicil. The word might mean all the previous unrevoked testamentary papers (*h*); but if that was what the testatrix meant, it was not easy to account for the subsequent revocation (by the third codicil) of a supposed existing gift to A in the first codicil. It was true that if she meant the will only without the codicil, then she was doing what was unnecessary, as the legacies in the will had already been revoked by the first codicil; nevertheless it was held, that the former interpretation best answered the apparent meaning of the testatrix, and that the legacies to B, C, D, and E were not revoked. And this construction was aided by the third codicil, which revoked the legacy given to A by a previous codicil, showing that the testatrix considered that

(*e*) *Per* Cairns, L.C., in *Kellett* v. *Kellett*, L. R. 3 H. L., at p. 167. See also *Doe* v. *Hicks*, 1 Cl. & F. 20; *Pennefather* v. *Lloyd*, [1917] 1 Ir. R. 337; *Re Florence*, 117 L. T. 701; *Hordern* v. *Hordern*, [1909] A. C. 210. The case of *Randfield* v. *Randfield*, 2 De G. & J. 57; 8 H. L. C. 225, does not belong here, but to the principle discussed *post*, p. 549.

(*f*) 3 Sim. 24, 2 R. & My. 624; compare *Baldwin* v. *Baldwin*, 22 Bea. 413.

(*g*) 3 Beav. 109; and see *Farrer* v. *St. Catharine's College*, L. R. 16 Eq. 19; *Pratt* v. *Pratt*, 14 Sim. 129; *Sawrey* v. *Rumney*, 5 De G. & S. 698; *Stokes* v. *Heron*, 12 Cl. & Fin. 161.

(*h*) See above, p. 118, and below, p. 185.

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A, and consequently the plaintiffs also, had at that time legacies left by the previous testamentary papers. And in *Cleoburey* v. *Beckett* (*i*), where legacies were given in a codicil to a class of persons "except A, who is not intended to take any benefit under my will or this codicil"; it was held by Sir J. Romilly, M.R, that these words did not operate as a revocation of an express gift by the will to A. He observed that the words were extremely ambiguous, and did not seem to him to import a distinct and present revocation of the devise in the will.

Invalid appointment by codicil no revocation of valid appointment by will.

And where (*k*) a testatrix having a testamentary power to appoint a sum of £4,000 among her husband and children, by her will, after making certain bequests, gave the residue of her property, including the £4,000, over which she had a disposing power, to her husband and children equally; and afterwards, a son having died leaving two children, she by codicil bequeathed the share of her residue which would have gone to him if he had survived her in trust for his children: it was held by Sir E. Kay, J., that the invalid appointment by the codicil did not operate as a revocation *pro tanto* of the gift of the £4,000 made by the will.

Erroneous recital, etc., in codicil.

An erroneous recital, or unintelligible provision in a codicil, does not, as a general rule, operate as a revocation of a clear gift in the will (*l*). But an erroneous recital does not prevent a codicil from operating as a revocation, wholly or partially, of an absolute gift in the will, if the substantive dispositions in the codicil show that intention (*m*).

Intention to revoke may be indicated by informal expressions.

An intention to revoke, though expressed in loose and untechnical language, or in terms capable *per se* of a limited interpretation, must nevertheless prevail, if it can be clearly collected from the whole will (*n*). On this principle, it is not necessary that the gift to be revoked should be accurately referred to (*o*), or that the legatee by the will should be actually named in the codicil (*p*).

Revocation founded on mistake.

X.—Revocation under an erroneous Assumption of Fact.—Mr. Jarman lays it down as a general principle (*q*), that

(*i*) 14 Bea. 583; see also *Agnew* v. *Pope*, 1 De G. & J. 49.

(*k*) *Duguid* v. *Fraser*, 31 Ch. D. 449; *Re Walker*, [1908] 1 Ch. 560. See also *Ward* v. *Van der Loeff*, [1924] A. C. 653, *ante*, p. 157.

(*l*) *Vaughan* v. *Foakes*, 1 Kee. 58, stated *post*, p. 604; *Gordon* v. *Hoffmann*, 7 Sim. 29 (erroneous recital of amount of legacy); *Van Grutten* v. *Foxwell*, [1897] A. C. 658.

(*m*) *Re Margitson*, 30 W. R. 920; 31 W. R. 257.

(*n*) *Read* v. *Backhouse*, 2 R. & My. 546.

(*o*) *Pilcher* v. *Hole*, 7 Sim. 208; *Carrington* v. *Payne*, 5 Ves. 423; and see the case of *Re Freme's Contract*, [1895] 2 Ch. 778, stated *ante*, p. 167.

(*p*) *Ellis* v. *Bartrum*, 25 Bea. 107; *Re Freme's Contract*, *supra*.

(*q*) First edition, p. 165.

"Where a testator by a codicil revokes a devise or bequest in his will, or in a previous codicil, expressly grounding such revocation on the assumption of a fact (*r*), which turns out to be false, the revocation does not take effect (*r*); being, it is considered, conditional, and dependent on a contingency which fails.

"Thus, in *Campbell* v. *French* (*s*), where a testator, having by will bequeathed to the two grandchildren of his late sister £500 each, by a codicil declared that he revoked the legacies bequeathed by his will to such grandchildren, 'they being all dead,' and the fact appearing to be that they were living, Lord Loughborough held, that the legacies were not revoked.

"So, in *Doe* d. *Evans* v. *Evans* (*t*), where a testatrix by her will, dated July, 1819, devised lands to A for life, with remainder to his first and other sons in tail, with remainder to his daughters in tail; and by a codicil, dated in 1829, after reciting the above devise, *and that A had died without leaving issue*, she devised the lands to B. The fact was that A died in 1827, leaving a posthumous child, whose birth was not known to the testatrix when she made her codicil, but she afterwards became acquainted with it. The Court considered that this was a conditional revocation; and the fact being contrary to what the testatrix supposed, the devise in the will remained in force.

Distinction where the fact itself, and where the advice or belief of the fact, is the ground of revocation.

"Had the testator in the preceding cases, instead of making the death of the devisee or legatee under the circumstances described the ground or reason of the revocation, founded such revocation on his advice or belief only of the fact, it is conceived that the result would have been different. A distinction of this nature seems to be warranted by *Att.-Gen.* v. *Lloyd* (*u*), where a testator having by a will made before the passing of the statute of 9 Geo. 2, c. 36 (*x*), devised lands and bequeathed personalty to be laid out in lands for charitable uses, made a codicil posterior to the act by which, after reciting that *being advised* the devise of his lands would be void, and it being his intention that the charity should be continued, and being advised his personal estate could be given, he did by such codicil give his personal estate to the charitable uses before mentioned; and he did thereby give his real estate to B. Though the testator's notion as to the invalidity of the devise in the will was erroneous (*y*), it was held that the devise to B took effect."

(*r*) See *Re Faris*, [1911] 1 Ir. R. 469; *Re Churchill*, [1917] 1 Ch. 206; *In b. Southerden*, [1925] P. 177.

(*s*) 3 Ves. 321.

(*t*) 2 Per. & D. 378; 10 Ad. & Ell. 228.

(*u*) 3 Atk. 552, 1 Ves. 32; and see the observations of Lord Eldon, 1 Mer. 148, 149.

(*x*) See Chap. IX, *post*, p. 237. (*y*) *Willet* v. *Sandford*, 1 Ves. 178, 186.

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In *Thomas* v. *Howell* (*z*), a testator by will bequeathed certain charity legacies, and by codicil, "presuming and believing that the rental of his estate would produce from £16,000 to £18,000," he doubled those legacies. The income of his whole estate fell short of £16,000, and Malins, V.-C., held that the additional bequest failed, as being founded on a mistake.

Att.-Gen. v. *Ward.*

Where a testatrix by her will bequeathed £300 among such of the children as should be living of E, and by a codicil proceeded as follows: "I give to my brother's son C the £300 designed for E's children, as I know not whether any of them are alive, and if they are well provided for": Sir R. P. Arden, M.R., held that the original bequest was revoked, and that C was entitled, though the children of E were living (*a*).

The real question in all these cases is, as Mr. Jarman points out in the passage above quoted, whether the revocation is absolute or conditional. If it is absolute it takes effect, although founded on a mistake on the part of the testator.

In *Barclay* v. *Maskelyne* (*b*), where a gift by will to A was referred to in a codicil as a gift to B, and as lapsed by the death of B, whereupon the subject of gift was otherwise disposed of by the codicil, it was held that the gift to A was not revoked.

In *Allen* v. *Bewsey* (*c*), a testator devised an estate as copyhold; by codicil reciting that he had since discovered that the estate was freehold, he confirmed the devise. It turned out that the estate was copyhold, and it appears to have been argued that the confirmation was conditional,—that the devise was meant to stand because (and not unless) the estate was freehold and was in effect revoked: but it was held without difficulty that the intention was to confirm the devise whether the estate was freehold or copyhold, and that there was no revocation.

Implied revocation by the effect of a codicil reviving an earlier will.

XI.—Revocation of later Will by Codicil reviving earlier Will.—Sometimes a codicil has the effect of impliedly revoking the later of two wills, by expressly referring to and recognising the prior one as the actual and subsisting will of the testator. The difficulty, in most of these cases, is to determine whether the codicil shows an intention to revive the earlier will; this question is discussed in the next Chapter. If the earlier will is revived, and it is inconsistent with the later will, the result

(*z*) L. R. 18 Eq. 198.
(*a*) *Att.-Gen.* v. *Ward*, 3 Ves. 327.
(*b*) Johns. 124.
(*c*) 7 Ch. D. 453.

generally is that the later one is impliedly revoked (*d*). Cases have, however, occurred in which all three documents have been admitted to probate (*e*).

Even if the earlier will has been destroyed, and therefore cannot be revived, the effect of the codicil may be to revoke the second will (*f*).

Whether confirmation of will revokes intermediate codicil.

Sometimes a testator makes a will and one or more codicils, and then makes a codicil expressly confirming the will, but not referring to the previous codicils : the question whether in such a case the previous codicils are revoked is considered in the next Chapter (*g*).

Wills Act, s. 19.

XII.—Revocation by Alteration in Circumstances.—Section 19 of the Wills Act enacts that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances. Having regard to the sweeping language of section 20, which enacts that no will shall be revoked except in certain specified ways, it is not easy to see the object of section 19. In *Re Wells's Trusts* (*h*) Stirling, J., relied on the section as negativing any presumption of an intention on the part of the testator to revoke his will.

(*d*) *Lord Walpole* v. *Lord Orford*, 3 Ves. 402; *Payne* v. *Trappes*, 1 Rob. 583; *In b. Reynolds*, L. R. 3 P. & D. 35; and other cases cited in next Chapter.

(*e*) *In b. Stedham*, 6 P. D. 205; *In b. Dyke*, *Ib.* 207; *In b. Edge*, 9 L. R. Ir. R. 516; *In b. Chilcott*, [1897] P. 223; *In b. Carleton*, [1915] 2 Ir. R. 9; *Re Baker*, [1929] 1 Ch. 668.

(*f*) See *Hale* v. *Tokelove*, 2 Rob. 318, *post*, p. 183.

(*g*) *Post*, p. 184.

(*h*) 42 Ch. D. 646, stated *post*, p. 813.

CHAPTER VIII.

REVIVAL AND REPUBLICATION OF WILLS.

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I.—Revival of Revoked Will or Codicil.—Revival is where a testamentary instrument or disposition, which has been revoked or become invalid, is restored or set up by re-execution, or by incorporation in a valid testamentary instrument (*a*).

Old law.

Under the old law, there was another way in which a revoked will or codicil could be revived, for if a testator executed two wills, the latter of which revoked the former, and then revoked the second will, the effect was to revive the first will (*b*), but this rule was abolished by the Wills Act (*c*).

Wills Act, s. 22.

The manner in which a revoked disposition can be revived under the present law is set forth in the Wills Act, section 22 of which enacts : " That no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked and afterwards wholly revoked shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shewn."

The section applies not only where the prior will is revoked by an express clause of revocation, but also where it is revoked by inconsistent dispositions contained in the later will (*d*).

If the later will is lost, or has been destroyed, its contents may be proved by parol evidence (*e*).

(*a*) *Skinner* v. *Ogle*, 9 Jur. 432.

(*b*) *Harwood* v. *Goodright*, Cowp. 92; *Usticke* v. *Bawden*, 2 Add. 116. Unless the first will was destroyed : *Burtonshaw* v. *Gilbert*, Cowp. 49.

(*c*) Section 22.

(*d*) *Brown* v. *Brown*, 8 Ell. & Bl. 876; *Boulcott* v. *Boulcott*, 2 Drew. 25.

(*e*) *Brown* v. *Brown*, *supra*; *Wood* v. *Wood*, L. R. 1 P. & D. 309; *Newton* v. *Newton*, *infra*. The remarks *contra* in *Wharram* v. *Wharram*, 3 Sw. & Tr. 301, are unfounded : *Sugden* v. *Lord St. Leonards*, 1 P. D. 239. But such evidence must show clearly that the contents of the second will

Parol evidence inadmissible to show intention to revive.

If a testator makes two wills, the second of which revokes the first, and then destroys the second will for the express purpose of setting up the first, he fails in his object; for parol evidence of his intention is not admissible in order to give effect to that object (*f*); though it is admissible to prove that the destruction was effected for the sole purpose of reviving the first will; in that case the doctrine of dependent relative revocation see above, p. 135) prevents the revocation of the destroyed will (*g*). Otherwise there is an intestacy (*h*).

Revival of partially revoked will.

The same rule applies where the second will is only a partial revocation of the former, or where a codicil partly revokes a will. In such a case, if the testator revokes the second will or the codicil, this does not revive the revoked portion of the first will, and probate is limited to the portions of the first will which were unaffected by the second will or the codicil. The result may be a partial intestacy (*i*).

Where prior will made before 1838.

By section 34, it is provided that the Act "shall not extend to any will made before 1838." Now if the first of two inconsistent wills be made before 1838, and the second be destroyed after that date, does section 22 extend to the case so as to prevent revival of the first will? Though revived, it would not be republished (*j*). It would therefore take effect wholly under the old law, and derive no virtue from the new. However, in *Dickinson* v. *Swatman* (*k*), the argument for revival was considered untenable.

What is re-execution.

Where a will was found with the signature cut off, but gummed on again, it was held that it was not duly re-executed (*l*).

Conditional revival.

A person who had duly executed his will, married, and subsequently executed another will in favour of his wife and children. In this second will the testator provided that if there were no issue of the marriage living at the death of his wife, he revived and brought into force again his former will, and directed that its provisions should be complied with as though it formed part of his second will. At the time of his death the wife and one child were living. It was held that the first will should be included in the probate (*m*).

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were such as to revoke the first. It is not enough to prove that the lost will contained the words "this is the last will and testament," *Cutto* v. *Gilbert*, 9 Moo. P. C. C. 131, cited again with others to the same effect, *ante*, p. 159.

(*f*) *Major* v. *Williams*, 3 Curt. 432; *S. C.* nom. *Major* v. *Iles*, 7 Jur. 219; *Newton* v. *Newton*, 12 Ir. Ch. R. 118.

(*g*) *Powell* v. *Powell*, L. R. 1 P. & D. 209.

(*h*) *In b. Brown*, 4 Jur. (N.S.) 244.

(*i*) *In b. Hodgkinson*, [1893] P. 339; *In b. Debac*, 77 L. T. 374.

(*j*) R. P. C. Fourth Report, p. 33.

(*k*) 4 Sw. & Tr. 205.

(*l*) *Bell* v. *Fothergill*, L. R. 2 P. & D. 148.

(*m*) *In b. Bangham*, 1 P. D 429.

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Meaning of "erase."

In *Wilkinson* v. *Schneider* (*n*), a testatrix by her will bequeathed certain chattels to her niece, Maria Dyer, then unmarried, absolutely; the niece married a man named Wilkinson, and six years afterwards the testatrix, by a codicil, revoked the bequest, and bequeathed the chattels to Maria Wilkinson and Sarah Butler (another niece), equally. In the following year Sarah Butler died, and a year later the testatrix made another codicil as follows: "My wish is, that in the event of the name of Maria Wilkinson having been erased from my will, it be reinstated as previously there placed." It was held by James, V.-C., that the codicil was inoperative. "I can only say the name of Maria Wilkinson is not erased, and that is all." The construction seems somewhat narrow.

Intention to revive.

Where a testator makes two wills, by the second of which he revokes the first, and then makes a codicil which he describes as a codicil to the first will, without referring to the second will, this may have the effect of reviving the first will and revoking the second (*o*). But this result does not always follow. In the first place, if the first will was revoked by destruction, it is incapable of being revived (*p*), although a copy of it may be incorporated in the codicil (*q*). And in the second place, assuming that the first will is still in existence, the codicil must show an intention to revive it. According to some cases, it is sufficient that the codicil should be described as a codicil to the first will (*r*). And if there is no ambiguity (*s*), parol evidence is inadmissible to show that the reference to the first will was a mistake, and that the testator really meant to refer to the second will (*t*). Other cases have been decided on the

(*n*) L. R. 9 Eq. 423.

(*o*) *Ante*, p. 176. In *In b. Courtenay*, 27 L. R. Ir. R. 507, the testator revoked his first will by a second will, then revived the first and revoked the second, and finally revived the second.

(*p*) *Hale* v. *Tokelove*, 2 Rob. 318; *Newton* v. *Newton*, 12 Ir. Ch. R. 118; *Rogers* v. *Goodenough*, 2 Sw. & Tr. 342; *In b. Reade*, [1902] P. 75. "I limit this, in my judgment, to cases where the will has been destroyed by the testator or by some person in his presence and by his authority. I say nothing as to what would be the effect if the instrument had been destroyed without his knowledge; that question may arise another day." *Per* Cresswell, J., in *Rogers* v. *Goodenough*.

(*q*) *In b. Lindsay*, 8 T. L. R. 507, *ante*, p. 128.

(*r*) *Payne* v. *Trappes*, 1 Rob. 583; *In b. Chapman*, 1 Rob. 1; *In b. Reynolds*, L. R. 3 P. & D. 35. In *In b. M'Cabe*, 31 L. J. Prob. 190, *In b. Stedham*, 6 P. D. 205, and *In b. Dyke*, 6 P. D. 207, there were other indications of an intention to revive the first will. The cases of *Lord Walpole* v. *Earl of Orford*, 3 Ves. 402; *S. C. nom. Lord Walpole* v. *Earl Cholmondeley*, 7 T. R. 138, and *Rogers* v. *Pittis*, 1 Ad. 30, were before the Wills Act.

(*s*) There is a latent ambiguity if a will of a certain date is referred to and there is no will of that date, *Jansen* v. *Jansen*, cited 1 Ad. 39. And there is a patent ambiguity if the testator makes a fourth codicil revoking three proceeding codicils, and then makes a fifth codicil confirming the will and the four codicils, *In b. Thomson*, L. R. 1 P. & D. 8.

(*t*) *In b. Chapman* and *Payne* v. *Trappes*, *supra*; *Walpole* v. *Cholmondeley*, 7 T. R. 138.

principle that a mere reference to the revoked will is not sufficient, and that the Court must satisfy itself by a careful examination of the language of the codicil that the testator intends by it to revive his first will (*u*). Evidence of the surrounding circumstances is always admissible (*v*).

Mistaken reference.

If a testator makes a codicil referring to a revoked will by date, but goes on to refer to testamentary dispositions which are not contained in it but in his later will, this is generally sufficient to show that the reference to the earlier will was a mistake, and that he had no intention of reviving it (*w*).

Ambiguous reference.

In a case (*x*) where a testator made two wills, the second of which revoked the first, and then executed a codicil which he declared to be a codicil to "my last will" and by which he confirmed "my said will in all respects," and went on to refer to certain provisions contained in the first will and not in the second, it was held that this revived the first will and revoked the second.

Where a codicil to a second will contains a recital referring to a previous codicil which was revoked by the second will, this is not sufficient to revive the revoked codicil (*y*).

Effect of word "confirm."

Where a codicil expressly confirms the first will, this is sufficient evidence of an intention to revive it (*z*).

Physical annexation.

A codicil does not show an intention (within the meaning of the section) to revive the earlier of two wills by being physically annexed to it (*e.g.*, by a piece of tape): the intention must appear from the contents of the codicil (*a*). But it seems that if a memorandum in the nature of a codicil is written upon the will and duly executed, it operates to revive the will, although it does not in direct terms refer to the will (*b*).

Intermediate will not revoked.

Where a testator makes two wills, the latter of which revokes the former, and then makes a codicil reviving the first will, but not expressly revoking the second will, the Court of Probate

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(*u*) *In b. Steele*, L. R. 1 P. & D. 575; *In b. May*, *ibid.* 581. In these cases and also in *In b. Ince*, 2 P. D. 111, it is submitted that the Court attached too much importance to the use of the expression "last will." See also *In b. Anderson*, 39 L. J. P. 55.

(*v*) *Ibid. In b. Brown*; *Quincey* v. *Quincey*, 11 Jur. 111; *In b. Snowden*, 75 L. T. 279.

(*w*) *In b. Wilson*, L. R. 1 P. & D. 582; *In b. Anderson*, 39 L. J. P. 55.

(*x*) *In b. Van Cutsem*, 63 L. T. 252; see *In b. M'Cabe*, 31 L. J. P. 190; *Re Baker*, [1929] 1 Ch. 668. In *Jane* v. *Jane*, 33 T. L. R. 389, the codicil was held not to revive the first will.

(*y*) *In b. Dennis*, [1891] P. 326.

(*z*) *McLeod* v. *McNab*, [1891] A. C. 471; *In b. Chilcott*, [1897] P. 223. In this case as in *In b. Stedham*, 6 P. D. 205, it was clear that the person who prepared the codicil was not aware of the existence of the second will, and therefore could not be taken to have intended to refer to it.

(*a*) *Marsh* v. *Marsh*, 1 Sw. & Tr. 528; *In b. Steele*, L. R. 1 P. & D. 575; *McLeod* v. *McNab*, [1891] A. C. 471.

(*b*) *In b. Terrible*, 1 Sw. & Tr. 140.

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generally allows all three documents to be proved, their effect being left to a Court of Construction to determine (*c*).

Confirmation of will partly revoked.

In *McLeod* v. *McNab* (*d*), the testator revoked by codicil a bequest contained in his will, and afterwards made another codicil which did not refer to the first codicil, but referred to the will as if the first codicil had never been executed: it was held that this revived the revoked bequest. This construction was aided by the fact that the second codicil confirmed the will in every other particular than as altered by that codicil (*e*).

Confirmation of codicil.

Where a testator made four codicils, the third of which revoked the first and second, and the fourth confirmed the will and former codicils, it was held that the first and second codicils remained revoked (*f*).

Codicil partly revoking revived will.

The latter part of section 22 provides that "when any will or codicil which shall be partly revoked and afterwards wholly revoked shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shewn." Now if partial revocation of a will—as of a devise of Blackacre to A in fee—has been caused by a codicil devising Blackacre to B in fee; and if this codicil has itself been afterwards included in the final revocation of the will, and the "will" is then revived, the devise of Blackacre to A remains revoked unless a contrary intention is shown. The will is restored as modified by the codicil, but by a short statutory method, without having recourse to the codicil, concerning which the statute is silent; and it may still be a question what becomes of the codicil. In *Neate* v. *Pickard* (*g*) a will and codicil were revoked by marriage, and afterwards by another codicil the testator confirmed his "last will" without referring to the date; and it was held that both were revived. At the date of the second codicil there were several alterations (unexecuted, it would seem) on the face of the will, and it was further held that the will was revived in its altered condition.

In *In b. M'Cabe* (*h*), the testator made a will and two codicils, all of which he revoked by a later will; he afterwards revived the first will, and it was held that the two codicils were also entitled to probate.

(*c*) *In b. Stedham*, 6 P. D. 205; *In b. Carleton*, [1915] 2 Ir. R. 9; *In b. Chilcott*, [1897] P. 223. This is not done if the revoked will was destroyed, *ante*, p. 180.

(*d*) [1891] A. C. 471.

(*e*) Confirmation of an existing will does not in general operate to revoke a codicil altering its dispositions. See *Crosbie* v. *Macdoual*, *post*, p. 185.

(*f*) *In b. Carritt*, 66 L. T. 379. Compare *French* v. *Hoey*, [1899] 2 Ir. R. 472.

(*g*) 2 N. of C. 406.

(*h*) 31 L. J. Prob. 190.

Where codicil expressly revoked.

On the other hand, in *In b. Reynolds* (*i*), the testator executed a will and codicil, and then made a second will revoking all previous testamentary papers; he afterwards executed a testamentary paper described as a codicil to the first will, and it was held that this operated to revive the first will, but not the codicil to it. The Court seems to have considered that "an intention to the contrary" was shown by the contents of the last testamentary paper.

Where revival is ineffectual.

If a testator makes two wills, the second of which revokes the first, and then destroys the first will, and subsequently executes a codicil professing to revive the first will, this intention being incapable of being carried into effect, the question arises whether the second will is revoked by the codicil. In *Hale* v. *Tokelove* (*j*), it was held that the codicil revoked the second will, while in *Rogers* v. *Goodenough* (*k*) probate was granted of the second will, and the codicil. The matter seems to depend on whether the second will and the codicil are or are not too inconsistent with one another to stand together (*l*).

II.—Republication.—Republication is sometimes used in the same sense as "revival," but more frequently it is applied to those cases where a valid will or codicil is re-executed or confirmed in such a way as to acquire some force or efficacy which it did not previously possess (*m*).

Express republication.

Republication is of two kinds, express and constructive (*n*). Express republication (more properly called re-execution) occurs where a testator repeats those ceremonies which are essential

(*i*) L. R. 3 P. & D. 35; *French* v. *Hoey*, [1899] 2 Ir. R. 472.

(*j*) 2 Rob. 318.

(*k*) 2 Sw. & Tr. 342; followed in *In b. Reade*, [1902] P. 75. See also in *In b. Brown* (*Quincey* v. *Quincey*), 11 Jur. 111.

(*l*) See *In b. Steele*, L. R. 1 P. & D., at p. 577, where *Newton* v. *Newton*, 12 Ir. Ch. R. 118, is also referred to.

(*m*) See *Skinner* v. *Ogle*, 9 Jur. 432. The question of republication was important under the old law, because it had the effect of bringing land acquired since the execution of the will within the operation of a residuary devise contained in the will. It was with reference to this question that Mr. Jarman remarked (1st ed., p. 176): "The operation of a codicil to extend the devise in a will made before 1838 to intermediately-acquired lands, may be negatived by the contents of the codicil itself, indicating a contrary intention; for though the republication takes places without positive intention, yet it can never operate in spite of such intention." See *Bowes* v. *Bowes*, 2 B. & P. 500; *S. C.* nom. *Countess of Strathmore* v. *Bowes*, 7 T. R. 482; *Parker* v. *Biscoe*, 3 J. B. Moo. 24; *Monypenny* v. *Bristow*, 2 R. & My. 117; *Ashley* v. *Waugh*, 4 Jur. 572; *Hughes* v. *Turner*, 3 My. & K. 666; *Doe* d. *York* v. *Walker*, 12 Mee. & W. 591; *Re Earl's Trusts*, 4 K. & J. 673.

(*n*) See generally as to republication under the old law the fourth edition of this work, Vol. I, pp. 193 *et seq.*; 1 Wms. Saund., notes to *Duppa* v. *Mayo*. Under the Statute of Frauds to republish a devise of freehold estate required an attestation by three witnesses; while, on the other hand, a will might have been republished with respect to copyholds and personalty without any attestation: *Long* v. *Aldred*, 3 Ad. 48; *Miller* v. *Brown*, 2 Hagg. 209; *Alford* v. *Earle*, 2 Vern. 209; *Abney* v. *Miller*, 2 Atk. 599.

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to constitute a valid execution, with the avowed design of republishing the will.

What is not re-execution.

Dry pen.

It will be remembered that where a will has been properly executed, and the testator and witnesses trace over their former signatures with a dry pen, with the intention of re-executing the will, this is not a valid re-execution (*o*).

In a case where a will had been properly executed, and some years afterwards the testator and the witnesses wrote their names on the will again, it was inferred from the circumstances that this was not done with the intention of re-executing it (*p*).

Constructive republication.

Republication in the ordinary sense of the term (sometimes called constructive republication) takes place where a testator makes a codicil to his will, or executes some testamentary instrument from which the inference can be drawn that he wishes it to be read as part of his will. Thus if the instrument is described as a "codicil to my will" (*q*), or if it is written on the same piece of paper as the will, and contains a reference to "my executors above named" (*r*), it operates as a republication of the will. A codicil has this effect even if it is expressed to be conditional on an event which does not happen (*s*). But if the testator, after making his will, executes another testamentary instrument containing nothing from which the inference above referred to can be drawn (as where the instrument is not described as a codicil and does not refer to the will in any way), its execution will not effect a republication of the will (*t*).

When republication of will includes codicil.

Where a testator makes a will and alters it by one or more codicils, and then makes a codicil confirming the will but not referring to the previous codicils, the question arises whether he thereby confirms them also. Mr. Jarman points out (*u*)

(*o*) *In b. Cunningham*, 29 L. J. P. 71. See above, pp. 95, 104, 145. The point was not taken in *Wade* v. *Nazer*, 6 No. of C. 46.

(*p*) *Dunn* v. *Dunn*, L. R. 1 P. & D. 277.

(*q*) *Acherley* v. *Vernon*, 3 Br. P. C. 85; *Potter* v. *Potter*, 1 Ves. sen. 437; *Pigott* v. *Waller*, 7 Ves. 98; *Goodtitle* v. *Meredith*, 2 M. & Sel. 5; *Barnes* v. *Crowe*, 1 Ves. jun. 486; *Skinner* v. *Ogle*, 9 Jur. 432; *Hughes* v. *Turner*, 3 My. & K. 666; *Rowley* v. *Eyton*, 2 Mer. 128 (as corrected 45 Ch. D. 637); *Re Taylor*, 57 L. J. Ch. 430. See also *Doe* v. *Davy*, Cowper, 158; *Gibson* v. *Montfort*, 1 Ves. sen. 485.

(*r*) *Serocold* v. *Hemming*, 2 Lee Eccl. R. 490. In *In b. Terrible*, 1 Sw. & Tr. 140, even slighter evidence than this was held sufficient to connect the memorandum with the will.

(*s*) *In b. Da Silva*, 30 L. J. P. 171.

(*t*) *Re Smith*, 45 Ch. D. 632. The statement contained in the earlier editions of this work that under the old law the mere execution of a codicil operated as a republication of the will (cited with approval by Sir H. J. Fust in *Skinner* v. *Ogle*, 9 Jur. 432) must be read in connection with the rule that the effect of republication was to pass after acquired lands, unless a contrary intention appeared.

(*u*) First ed., p. 172.

that "it is necessary to bear in mind that every codicil is a constituent part of the will to which it belongs; for in a general and comprehensive sense, a will consists of the aggregate contents of all the papers through which it is dispersed; and, therefore, where a testator in a codicil refers to and confirms a revoked will, it is not necessarily to be inferred that he means to set up the will (using the word in its special and more restricted sense) in contradistinction to, and in exclusion of, any intermediate codicil or codicils which he may have engrafted on it. He is rather to be considered as confirming the will with every codicil which may belong to it; and accordingly, in a case (*v*) where a person made his will, and afterwards executed several codicils thereto, containing partial alterations of and additions to the will; and by further codicil, referring to the will by date, he changed one of the trustees and executors, and in all other respects expressly confirmed the will, this confirmation of the will was held not to revive the parts of it which were altered or revoked by the preceding codicils: Sir R. P. Arden, M.R., observing that if a man ratifies and confirms his last will, he ratifies and confirms it with every codicil that has been added to it."

Crosbie v. *Macdoual.*

So in *Green* v. *Tribe* (*w*), where the testatrix made a codicil by which she revoked certain gifts contained in her will, and afterwards made a second codicil confirming her will, but not referring to the first codicil, it was held that the second codicil confirmed the will as modified by the first codicil.

Green v. *Tribe.*

In *Follett* v. *Pettman* (*x*), the testator made two codicils, each confirming the will, and then made a third codicil, by which he confirmed his will "except as altered by" the first codicil: it was held by Kay, J., that no intention to revoke the second codicil was shown.

On the other hand, in *McLeod* v. *McNab* (*y*), where the confirmation of the will was expressly made subject to the alterations contained in a second codicil, this, combined with various indications that the testator considered the first codicil as superseded, was held to show an intention on the part of the testator to revoke the first codicil.

In one case in the Ecclesiastical Court it was held that the mere fact of the testator ratifying his will and certain specified

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(*v*) *Crosbie* v. *Macdoual*, 4 Ves. 610; see also *Gordon* v. *Lord Reay*, 5 Sim. 274, stated *ante*, p. 118; *Wade* v. *Nazer*, 12 Jur. 188; *In b. De la Saussaye*, L. R. 3 P. & D. 42; *Follett* v. *Pettman*, 23 Ch. D. 337; *Re Vyvyan*, [1883] W. N. 47.

(*w*) 9 Ch. D. 231.

(*x*) 23 Ch D. 337.

(*y*) [1891] A. C. 471.

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codicils, did not of itself amount to an implied revocation of other codicils not so specified (*z*). But, in another case, the Court arrived at a different conclusion, on the comparison of the contents of all the instruments, and looking at the conduct of the testatrix in relation to them (*a*).

Burton v. *Newbery.*

The question whether a codicil confirming the testator's will also confirms an intermediate codicil, was discussed by Jessel, M.R., in *Burton* v. *Newbery* (*b*). But the question in that case was simply whether the second codicil gave validity to a gift in the first codicil which was void by reason of the legatee being an attesting witness. It is submitted that the decision was erroneous, because the first codicil was clearly part of the will, and that the cases on the incorporation of unattested or otherwise invalid testamentary papers had nothing to do with the point. It is clear from *Crosbie* v. *Macdoual* and *Green* v. *Tribe*, that the mere fact that the testator describes his will by a reference to its original date, does not exclude the inference that the will thus referred to is the will as modified by a previous codicil (*c*). In *Burton* v. *Newbery* the effect of the second codicil was either to republish the will and the first codicil, or to republish the will and revoke the first codicil. To hold that it had the latter effect would be to run counter to *Crosbie* v. *Macdoual* and other undoubted authorities.

Where evidence of *animus* admissible.

Where a testator makes a will and codicil, and afterwards re-executes the will without referring to the codicil, the question arises whether this revokes the codicil. It seems that in such a case parol evidence is admissible to show *quo animo* the will was republished, and thus to show that the testator could not have intended to revoke the codicil (*d*): as for example if his object in re-executing the will is to give effect to some alterations in it (*e*).

III.—Effect of Republication.—The effect of republication, as a general rule, is to make the will bear the date of republication. Thus in *Doe* v. *Walker* (*f*), where the testator, in February, 1838, executed a codicil confirming his will, executed in February, 1837, Parke, B., said: "It is clear that the will, so republished by the codicil, and altered by it, together with

(*z*) *Smith* v. *Cunningham*, 1 Ad. 448.
(*a*) *Greenough* v. *Martin*, 2 Ad. 239.
(*b*) 1 Ch. D. 234, stated above, p. 118.
(*c*) The decision in *Burton* v. *Newbery* seems to be approved of in *French* v. *Hoey*, [1899] 2 Ir. R. 472.
(*d*) *Upfill* v. *Marshall*, 3 Curt. 636; *Wade* v. *Nazer*, 1 Rob. 627.
(*e*) *In b. Rawlins*, 48 L. J. P. 64.
(*f*) 12 M. & W. 591. *Grealey* v. *Sampson*, [1917] 1 Ir. R. 286, stated *post*, p. 187.

that codicil, constituted a new will of the date of the codicil." Consequently the provisions of the Wills Act applied to it. So in *Re Fraser* (*g*), where there were several codicils, it was said by the Court of Appeal: "The effect of this is to bring the will down to the date of the [last] codicil, and effect the same disposition of the testator's estate as if the testator had at that date made a new will, containing the same dispositions as the original will, but with the alterations introduced by the various codicils."

In *Grealey* v. *Sampson* (*h*) the testator gave his son a power to charge a jointure not exceeding £200 per annum. The son married and subsequently by a codicil the testator charged a jointure of £200 per annum for the son's wife. It was held that the codicil republished the will, so that the son could charge £200 per annum in addition to the £200 per annum given by the will, and that extrinsic evidence of the value of the estate charged was not admissible.

Effect on residuary devise.

The doctrine of republication under the old law was of considerable importance, because by means of it lands of inheritance acquired by a testator since the execution of his will were often brought within the operation of any general or residuary devise contained in the will.

For this purpose the operation of the devise was brought down to the date of the codicil (*i*). And the same principle applied to a devise of estates within a certain locality: thus if a testator devised all his lands in the county of Kent, and after the execution of his will purchased other lands in that county, and then made a codicil attested by three witnesses, the intermediately-acquired lands (not being otherwise disposed of by such codicil) passed under the will (*k*).

Contrary intention.

But of course the operation of a codicil to extend the devise in a will, made before 1838, to intermediately-acquired lands,

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(*g*) [1904] 1 Ch. 726; *Re Taylor*, [1909] W. N. 59; *Re Donald*, 53 Sol. J. 673.

(*h*) [1917] 1 Ir. R. 286.

(*i*) See *Coppin* v. *Fernyhough*, 2 Bro. C. C. 291; *Hulme* v. *Heygate*, 1 Mer. 285; *Williams* v. *Goodtitle*, 10 B. & C. 895. If, however, the codicil referred to the land devised by the will in such a way as to show that the testator did not have the after-acquired land in his mind, the republication did not operate to pass it: *Bowes* v. *Bowes*, 2 Bos. & P. 500; *Monypenny* v. *Bristow*, 2 R. & My. 117; *Hughes* v. *Turner*, 3 My. & K. 666. Compare *Re Taylor*, [1909] W. N. 59. The doctrine was not of so much importance with respect to wills of personal estate, inasmuch as a residuary bequest, even under the old law, embraced all property of that kind of which the testator died possessed.

(*k*) *Beckford* v. *Parnecott*, Cro. El. 493; *Barnes* v. *Crowe*, 1 Ves. jun. 486; 4 Br. C. C. 2; *Yarnold* v. *Wallis*, 4 Y. & C. 160; *Doe* d. *York* v. *Walker*, 12 M. & Wels. 591; and see 1 Wms. Saund. 278, n.

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might be negatived by the contents of the codicil itself indicating a contrary intention (*l*).

Effect on specific devise.

"In regard to specific devises," Mr. Jarman remarks (*m*), "the principle that the will speaks from the date of the republication, is to be received with more caution and reserve. It is clear, however, that the devise of a particular property republished by the re-execution of the will, or the execution of a codicil, will, even under the old law, comprise a new estate in that property intermediately-acquired by the testator, and falling within the terms of the republished devise. As where a testator, by a will made before 1838, devised a leasehold estate, afterwards renewed the lease, and then republished the will, it was held that the renewed lease passed under the devise" (*n*).

Re Champion.

According to some modern cases, however, there is little or no difference between a general and a specific devise, so far as the effect of republication is concerned. Thus in *Re Champion* (*o*), the testator specifically devised his freehold cottage and the land thereto belonging, which he described as being "now in my occupation"; he afterwards purchased two fields adjoining the cottage, and occupied the whole until some years later, when he made a codicil confirming his will: it was held that the two fields passed by the devise.

When subject of gift is changed.

Mr. Jarman continues (*p*): "Republication by codicil or otherwise, however, did not under the old law extend a specific gift in the will to property which that gift was not originally intended to embrace, though answering to the same description. Thus, if a testator by a will made before the year 1838, devised his estate called Blackacre, or bequeathed his horse called Bob, and afterwards sold the estate or horse and bought another of the same name, a subsequent codicil made before the year 1838, did not by its republishing force make the devise or bequest extend to the new purchase."

Whether the same rule applies since the Wills Act, does

(*l*) See the passage quoted from Mr. Jarman and the cases cited *ante*, p. 183, n. (*m*), and the comments thereon in the 4th edition of this work.

(*m*) First edition, p. 180.

(*n*) *Coppin* v. *Fernyhough*, 2 Bro. C. C. 291. See also *Carte* v. *Carte*, 3 Atk. 180; *Alford* v. *Earle*, 2 Vern. 209; *Jackson* v. *Hurlock*, 2 Ed. 263. It is not clear whether the decision of Bacon, V.-C., in *Wedgwood* v. *Denton*, L. R. 12 Eq. 290, went on the effect of the republication or of section 24 of the Wills Act. The case is referred to *ante*, p. 151.

(*o*) [1893] 1 Ch. 101. The principle of this decision was followed in *Re Rayer*, [1903] 1 Ch. 685; *Re Fraser*, [1904] 1 Ch. 726 (exception from general bequest); *Re Smith*, [1916] 1 Ch. 523; [1916] 2 Ch. 368 (residuary bequest) and *Re Reeves*, [1928] 1 Ch. 351 ("my present lease"). *Re Champion* is also referred to in connection with the effect of words of description, in Chap. XXXV, p. 1035, and also at p. 392, *post*.

(*p*) First edition, p. 180.

not seem to have been decided (*q*); the question as to the disposition of after-acquired property has generally arisen in connection with section 24 of the Wills Act (*r*).

Mr. Jarman continues (*s*) : "So it has been repeatedly held that a legacy to a child, which has been adeemed or satisfied by a subsequent advancement to the legatee, is not revived by a constructive republication of the will by means of a codicil, such codicil not indicating an intention to revive the legacy, though containing an express confirmation of the will in the usual general terms" (*t*). This doctrine is clearly settled :—"It is very true that a codicil republishing a will makes the will speak as from its own date for the purpose of passing after-purchased lands, but not for the purpose of reviving a legacy revoked, adeemed or satisfied. The codicil can only act upon the will as it existed at the time; and at the time, the legacy revoked, adeemed, or satisfied formed no part of it" (*u*).

Revoked or adeemed legacy.

Mr. Jarman continues (*x*) : "The same principle, of course, applies to the *objects* of gift : it is clear, therefore, that a codicil does not, by its republishing operation, revive a devise or bequest, the object of which has previously died in the testator's lifetime. Thus, if a testator devises lands to his nephew John, who dies in the testator's lifetime, and he afterwards has another nephew of the same name the republication of the will would be inoperative to carry the property to the second nephew John" (*y*).

Object of gift.

The fact that the bequest was to "A, his executors, administrators and assigns" makes no difference (*z*).

(*q*) In *Macdonald* v. *Irvine*, 8 Ch. D. 101, the newly-purchased property did not answer the description of the property sold. In *Re Pilkington's Trusts*, 6 N. R. 246, the decision does not seem to have turned on the question of republication : *post*, p. 1054. The question in all cases seems to be one of intention : see *Re Champion*, *ante*, p. 188.

(*r*) *Post*, p. 380.

(*s*) First edition, p. 181.

(*t*) *Izard* (*Irod*) v. *Hurst*, Freem. 224; *Monck* v. *Lord Monck*, 1 Ba. & Be. 298; *Booker* v. *Allen*, 2 R. & My. 270; *Powys* v. *Mansfield*, 3 My. & Cr. 376; *Montague* v. *Montague*, 15 Bea. 565; *Hopwood* v. *Hopwood*, 7 H. L. C. 728; *Sidney* v. *Sidney*, L. R. 17 Eq. 65. See also *Drinkwater* v. *Falconer*, 2 Ves. sen. 623; *Crosbie* v. *Macdoual*, 4 Ves. 610; *Cowper* v. *Mantell*, 22 Bea. 223.

(*u*) *Per* Lord Cottenham, *Powys* v. *Mansfield*, 3 Myl. & Cr. at p. 376; cited with approval in *Hopwood* v. *Hopwood*, 7 H. L. C. 728. It was somewhat doubtful under the old law whether lands of which a specific devise in fee had lapsed by the decease of the devisee in the testator's lifetime, passed by a residuary devise in the republished will. See *Doe* v. *Sheffield*, 13 East, 526, and *Williams* v. *Goodtitle*, 10 Barn. & Cres. 895, and the comments on those cases in the 4th edition of this work.

(*x*) First edition, p. 182.

(*y*) See *Drinkwater* v. *Falconer*, 2 Ves. sen. 626; *Doe* v. *Kett*, 4 T. R. 601. The case of *Perkins* v. *Micklethwaite*, 1 P. W. 274, must be referred to the express terms of the codicil.

(*z*) *Hutcheson* v. *Hammond*, 3 Br. C. C. 128.

In *Re Hardyman* (*a*) the testatrix by her will gave a legacy in trust for her cousin, his children, and his wife. The wife died. The testatrix made a codicil; after which the cousin remarried. It was held that the second wife was entitled to benefit under the bequest.

Republication does not cure defect of expression in will.

"The effect of republication," says Mr. Jarman (*b*), "can never extend further than to give the words of the will the same force and operation as they would have had if the will had been executed at the time of republication: it cannot invest with a devising efficacy expressions which originally had none" (*c*). And although it is true that a codicil confirming a will makes the will for many purposes to bear the date of the codicil, yet this rule is subject to the limitation that the intention of the testator be not defeated thereby. If, therefore, the testator, in making his will, obviously means its provisions to apply to a state of circumstances existing at its date, republication will not make its provisions apply to the state of circumstances existing at the date of the codicil (*d*). To this principle may be referred the decision in *Re Taylor* (*e*). There the testatrix, a married woman, made a will in general terms which was obviously intended to be merely an exercise of a power of appointment over property comprised in her marriage settlement; on the death of her husband she became entitled to real and personal estate, and made a codicil disposing of the real estate: it was held that although this operated as a confirmation of the will, it did not alter its construction or scope; it followed that the personalty was undisposed of.

It seems that if a testator executes a codicil republishing his will, its effect is the same whether he expressly confirms his will or not (*f*).

Lapse of residuary devise or bequest.

"If the residuary devise contained in a will has itself lapsed, of course the republication of the will is inoperative to impart new efficacy to the devise, as well where the lapse affects an aliquot share only of the residue, as where it embraces the entirety. Thus, if a testator devise the residue of his lands to A, B, and C, as tenants in common in fee, and A dies, and

(*a*) [1925] 1 Ch. 287.

(*b*) First edition, p. 182.

(*c*) *Lane* v. *Wilkins*, 10 East, 241.

(*d*) See *Bowes* v. *Bowes* and other cases cited *ante*, p. 187; *Doe* d. *Biddulph* v. *Hole*, 15 Q. B. 848; *Stilwell* v. *Mellersh*, 20 L. J. Ch. 356; *Mountcashell* v. *Smyth*, [1895] 1 Ir. R. 346; *Re Moore*, [1907] 1 Ch. 315.

(*e*) 57 L. J. Ch. 430; *Du Hourmelin* v. *Sheldon*, 19 Bea. 389, was a similar case.

(*f*) See *per* Wigram, V.-C., in *Humble* v. *Shore*, 1 H. & M. 551, n.; *Re Taylor*, 57 L. J. Ch. 430. As to the effect of an express confirmation when the question of implied revocation arises, see *ante*, p. 176.

then the testator makes a codicil to his will, by the effect of which the will is republished, he would nevertheless die intestate as to one-third, since the subsisting devise, which originally embraced two-thirds only, could never, by the mere effect of the republication, be expanded into a gift of the entirety" (*g*).

And the rule is the same in the case of a residuary bequest of personalty (*h*).

Where a will, made since the Wills Act, is so worded as to exclude after-acquired lands from a general devise, a codicil republishing the will has no more effect in altering the effect of the general devise, than it would have had if both instruments had been subject to the old law (*i*).

Where exception from residuary gift.

When property is excepted from a residuary bequest, and specifically disposed of, and the specific bequest fails by lapse or otherwise, the property, as a general rule, falls into the residue under the doctrine of *Blight* v. *Hartnoll* (*k*). But if the specific bequest fails by the death of the legatee, and the testator afterwards republishes the will, the effect of this is to exclude the doctrine, because the will is then read as if the testator had excepted the property from the residuary bequest without making any disposition of it (*l*).

Application of Wills Act to will made before 1838.

It will be remembered that a will executed before January 1, 1838, is subject to the provisions of the Wills Act if it has been republished since that day (*m*).

The doctrine of republication was formerly of importance in the case of wills made by married women, because under the old law a married woman had no general testamentary capacity; but the law has been altered in this respect (*n*).

The effect of republication in giving validity to a legacy which was originally void by reason of the legatee being an attesting witness to the will has been already referred to (*o*).

The application of the doctrine of republication to appointments under powers is considered elsewhere (*p*).

Where statutory alteration has been made after execution of will.

It sometimes happens that after a will has been made, a statute is passed which affects the dispositions of the testator,

(*g*) Mr. Jarman, 1st edition, p. 185.

(*h*) See *Skrymsher* v. *Northcote*, 1 Sw. 566; *Re Wood's Will*, 29 Bea. 236. As to the effect of directing that a share which has lapsed, or the gift of which has been revoked, shall fall into residue, see *post*, p. 1018.

(*i*) *Re Farrer's Estate*, 8 Ir. C. L. 370.

(*k*) 23 Ch. D. 218.

(*l*) *Re Fraser*, [1904] 1 Ch. 726.

(*m*) Wills Act, s. 34. *Doe* v. *Walker*, *ante*, p. 186; *Lady Langdale* v. *Briggs*, 8 D. M. & G. 391.

(*n*) *Ante*, p. 59.

(*o*) *Ante*, p. 82.

(*p*) *Post*, pp. 816 *seq.*

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and that he afterwards executes a codicil so as to republish the will. The question then arises whether the will is to be deemed to have been made since the passing of the statute. In *Re Elcom* (*q*), the will was made before, and the codicil after, the passing of Malins' Act, and it was held that the will was not an instrument "made after December 31, 1857," within the meaning of the Act.

Re Rayer.

In *Re Rayer* (*r*), the will was made before, and the codicil after, the passing of the Customs, etc., Act, 1888, by which legacy duty was abolished in respect of annuities charged on land and other duties substituted; by his will the testator had directed certain annuities charged on land to be paid without any deduction except for legacy duty and income tax: it was held that by republishing his will the testator must be taken to have intended the annuitants to pay the substituted duties.

Republication how far affected by the Wills Act.

"The doctrine of republication," as Mr. Jarman remarks, "has lost much of its interest under the statute 1 Vict. c. 26, not, indeed, by the effect of the provision which dispenses with publication as part of the ceremonial of execution (though this may seem to render the term *re*-publication scarcely appropriate (*s*)), but by the operation of the enactment, which makes the will speak, in regard to the subjects of disposition, from the death of the testator: and more especially of the provision, which extends a general or residuary devise to all the real estate to which the testator may happen to be entitled at his decease. . . . It is to be remembered, however, that with respect to the *objects* of gift, the statute leaves the pre-existing law untouched; though, considering how slight an effect is produced by a republishing codicil in this respect (for we have seen that it does not revive a lapsed gift), this forms no very large exception to the remark, as to the diminished practical interest of the doctrine of republication, in connection with the new law" (*t*).

At the present day, however, the tendency of the Courts seems to be to give greater effect to republication than Mr. Jarman thought warranted by the old authorities.

Republication cannot invalidate a valid gift.

It would seem, on general principles, that if a testamentary gift is valid at the date of the will, it cannot be invalidated by

(*q*) [1894] 1 Ch. 303.
(*r*) [1903] 1 Ch. 685.
(*s*) But see section 34.
(*t*) First edition, p. 186. See as to the effect of republication of a will made under the old law by a codicil made since 1837: *Winter* v. *Winter*, 5 Hare, 306; *Doe* d. *York* v. *Walker*, 12 M. & Wels. 591; *Andrews* v. *Turner*, 3 Q. B. 177; *Skinner* v. *Ogle*, 9 Jur. 432; *Brooke* v. *Kent*, 3 Moo. P. C. C. 334.

mere republication of the will. In *Re Moore* (*u*) a testator gave property to a charity; as the will was executed more than three months before his death, the gift took effect under the Charitable Donations and Bequests (Ireland) Act, 1844. The will was republished by a codicil made less than three months before the testator's death. It was held that the charitable gift was not invalidated.

(*u*) [1907] 1 Ir. R. 315.

CHAPTER IX (*a*).

GIFTS FOR ILLEGAL, SUPERSTITIOUS AND CHARITABLE PURPOSES.

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Illegal object.

I.—Gifts for Illegal Purposes, etc.—A testator cannot devote any part of his property to an illegal object, either directly, or by means of a condition (*b*) or a secret trust (*c*).

Public policy.

Thus a trust to apply money to purchase the discharge of persons committed to prison for non-payment of fines under the game laws (*d*), and a trust to print and circulate a treatise inculcating the supremacy of the Pope (*e*), and gifts towards the political restoration of the Jews (*f*), have been held void as being against public policy, but there is nothing illegal in a bequest because it may involve a denial of Christianity (*g*).

Nugatory disposition.

Nor can a testator direct that his property shall not be occupied or used for a certain period. Thus in *Brown* v. *Burdett* (*h*), a testatrix devised buildings to trustees upon trust that they should be blocked up for twenty years; it was held that this direction was nugatory, and that there was an intestacy during the twenty years. So a direction to carry on a business for a certain number of years, without giving any one the benefit of the profits made during that period, is inoperative (*i*).

(*a*) This subject cannot be adequately treated in a single chapter; for a fuller treatment the reader is referred to the 2nd edition of Tyssen on Charitable Bequests, and the 5th edition of Tudor on Charities.

(*b*) See *post*, p. 1437. As to the application of the doctrine of *cy-près* to bequests for illegal purposes, see *post*, p. 234.

(*c*) See Chap. XXIV, *post*, p. 884.

(*d*) *Thrupp* v. *Collett* (*No.* 1), 26 Bea. 125.

(*e*) *De Themmines* v. *De Bonneval*, 5 Russ. 288. See also *Re Moore*, [1919] 1 Ir. 316.

(*f*) *Habershon* v. *Vardon*, 4 De G. & Sm. 467.

(*g*) *Bowman* v. *Secular Society, Ltd.*, [1917] A. C. 406, which seems to overrule *Briggs* v. *Hartley*, 19 L. J. Ch. 416. See also *Thompson* v. *Thompson*, 1 Coll. 381, at p. 397. In *Universal Negro Improvement Association* v. *Morter*, 72 Sol. J. 154, it was held that it had not been proved that the Association was incorporated for illegal objects.

(*h*) 21 Ch. D. 667.

(*i*) *Re Cameron*, 26 Ch. D. 19.

The effect of a direction by a testator that his heir-at-law or next-of-kin shall not take any part of his estate is considered elsewhere (*k*).

Superstitious uses.

II.—Superstitious Uses.—"A superstitious use may be defined generally to be one which has for its object the propagation of the rites of a religion not to be tolerated." This definition from Boyle on Charities, p. 242, is quoted by Lord Birkenhead, C., in *Bourne* v. *Keane* (*l*), adding: "This is not exhaustive, but will serve as a working definition." Before the Toleration Act, 1688, trusts for the promotion of religious opinions differing from those of the established church were void, but nowadays, by reason of that Act, and a series of subsequent Acts (*m*), gifts for the propagation of any religious faith are good. Thus trusts for the promotion directly or indirectly of the views of Protestant Dissenters (*n*), Unitarians (*o*), Baptists (*p*), Plymouth Brethren (*q*), Wesleyans (*r*), Methodists (*s*), Presbyterians (*t*), Roman Catholics (*u*), Jews (*x*), Irvingites (*y*), Southcotians (*z*), Episcopalians in Scotland (*a*), Moravians (*b*), and the Salvation Army (*c*), are good.

Gifts for masses.

But in spite of the Roman Catholic Relief Act, it was for a long time supposed that, by reason of the Chantries Act, 1347, gifts for masses were void as superstitious. This view was disposed of by the decision of the House of Lords in *Bourne* v. *Keane* (*d*), where Lord Birkenhead's judgment gives a full

(*k*) Chap. XXI.

(*l*) [1919] A. C., at p. 845.

(*m*) The Dissenting Ministers Relief Act, 1779; the Roman Catholic Toleration Act, 1791; the Toleration Amendment Act, 1812; the Unitarian Relief Act, 1863; the Roman Catholic Relief Act, 1829; the Roman Catholic Charities Act, 1832; the Jewish Relief Act, 1846; the Roman Catholic Charities Act. 1860; the Roman Catholic Relief Act, 1926.

(*n*) *Att.-Gen.* v. *Hickman*, 2 Eq. Ca. Ab. 193; *Lloyd* v. *Spillet*, 2 Atk. 148; *Att.-Gen.* v. *Fowler*, 15 Ves. 85; *Att.-Gen.* v. *Pearson*, 3 Mer. 353.

(*o*) *Shrewsbury* v. *Hornby*, 5 Hare, 406; *Re Barnett*, 29 L. J. Ch. 871; *Re Wall*, 42 Ch. D. 510.

(*p*) *Att.-Gen.* v. *Cock*, 2 Ves. Sen. 273.

(*q*) *Re Brown*, [1898] 1 Ir. R. 423; *Re Redish*, 26 T. L. R. 42.

(*r*) *Re St. John Street Wesleyan Methodist Chapel, Chester*, [1893] 2 Ch. 618.

(*s*) *Dawson* v. *Small*, L. R. 18 Eq. 114.

(*t*) *Att.-Gen.* v. *Wansay*, 15 Ves. 231; *Jackson* v. *Att.-Gen.*, [1917] 1 Ir. R. 332.

(*u*) *Bradshaw* v. *Tasker*, 2 My. & K. 221; *West* v. *Shuttleworth*, 2 My. & K. 684; *Walsh* v. *Gladstone*, 1 Phil. 290.

(*x*) *Straus* v. *Goldsmid*, 8 Sim. 614; *Re Michel's Trust*, 28 Bea. 39.

(*y*) *Att.-Gen.* v. *Lawes*, 8 Hare, 32.

(*z*) *Thornton* v. *Howe*, 31 Bea. 14.

(*a*) *Att.-Gen.* v. *Guise*, 2 Vern. 266.

(*b*) *Commissioners of Income Tax* v. *Pemsel*, [1891] A. C. 531.

(*c*) *Re Fowler*, 31 T. L. R. 102.

(*d*) [1919] A. C. 815, overruling *West* v. *Shuttleworth*, 2 My. & K. 664; *Heath* v. *Chapman*, 2 Drew, 417; *Re Blundell's Trusts*, 30 Bea. 360; *Re Fleetwood*, 15 Ch. D. 594; and *Re Elliott*, 39 W. R. 297.

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history of the subject. Gifts for masses were previously held good in Ireland (*e*), and, after some difference of opinion, were also held to be charitable (*f*). It has not yet been decided whether a gift for masses in England is charitable, but probably the Irish view will be adopted though it was not in the Canadian case of *Re Zeagman* (*g*). In *Yeap Cheah Neo* v. *Ong Cheng Neo* (*h*), a direction in a will made by a Chinese woman living in Penang, that a house termed "Sow Chong" for performing religious ceremonies to her husband and herself be erected, was held void as a perpetuity, since it was not charitable. The decision seems to have been based on an analogy of gifts for masses; and if *Bourne* v. *Keane* (*i*) had then been decided, the decision might possibly have been different.

Chinese religious ceremonies.

Monastic orders.

In *Re Smith* (*k*), the testator gave his residuary estate in trust for the society or institution known as the Franciscan Friars of Clevedon, in the County of Somerset, absolutely; Joyce, J., held that, in spite of sections 28 and 37 of the Catholic Relief Act, 1829 (which were then unrepealed), the gift was valid as an immediate gift to the individual friars composing the society or institution at the testator's death; but it is difficult to justify the decision, which is not wholly consistent with a series of Irish cases on gifts for the benefit of monastic orders (*l*).

Restrictions on gifts to charities.

III.—Charitable Gifts.—Gifts of property for charitable purposes were in some respects favoured, and in others discouraged, by the law. Thus while gifts of land by will for charitable purposes were subject to the statutory restrictions

(*e*) *Att.-Gen.* v. *Delaney*, Ir. R. 10 C. L. 104; *Perry* v. *Tuomey*, 21 L. R. Ir. 480.

(*f*) *O'Hanlon* v. *Logue*, [1906] 1 Ir. R. 247; *Att.-Gen.* v. *Hall*, [1896] 2 Ir. R. 291; [1897] 2 Ir. R. 426, overruling *Att.-Gen.* v. *Delaney*, Ir. R. 10 C. L. 104. Earlier cases are *Dillon* v. *Reilly*, Ir. R. 10 Eq. 152; *Phelan* v. *Slattery*, 19 L. R. Ir. 177; *Reichenbach* v. *Quin*, 21 L. R. Ir. 138; *Small* v. *Torley*, 25 L. R. Ir. 388; *Morrow* v. *M'Conville*, 11 L. R. Ir. 236; *Dorrian* v. *Gilmore*, 15 L. R. Ir. 69; *Healy* v. *Att.-Gen.*, [1902] 1 Ir. R. 342; *Kehoe* v. *Wilson*, 7 L. R. Ir. 10; *Perry* v. *Tuomey*, 21 L. R. Ir. 480; *Brannigan* v. *Murphy*, [1896] 1 Ir. R. 418; *Richardson* v. *Murphy*, [1903] 1 Ir. R. 227.

(*g*) (1916), 37 O. L. R. 336.

(*h*) L. R. 6 P. C. 381.

(*i*) [1919] A. C. 815.

(*k*) [1914] 1 Ch. 937; *Re Barclay*, [1929] 2 Ch. 173.

(*l*) *Simms* v. *Quinlan*, 16 Ir. Ch. 191; 17 Ir. Ch. 43; *Walsh* v. *Walsh*, Ir. R. 4 Eq. 396; *Kehoe* v. *Wilson*, 7 L. R. Ir. 10; *Liston* v. *Keegan*, 9 L. R. Ir. 531; *Morrow* v. *M'Conville*, 11 L. R. Ir. 236; *Murphy* v. *Cheevers*, 17 L. R. Ir. 205; *Carbery* v. *Cox*, 3 Ir. Ch. 231; *Roche* v. *M'Dermott*, [1901] 1 Ir. R. 394; *Burke* v. *Power*, [1905] 1 Ir. R. 119; *Cussen* v. *Hynes*, [1906] 1 Ir. R. 539; *Re Murphy*, *ibid.* 505; *MacLaughlin* v. *Campbell*, [1906] 1 Ir. R. 588. See also *Hogan* v. *Byrne*, 13 Ir. C. L. R. 166; *Re Brown*, [1898] 1 Ir. R. 423; *Ellard* v. *Phelan*, [1914] 1 Ir. R. 76; and *Commissioners of Charities* v. *McCartan*, [1917] 1 Ir. R. 388. But in *Re Green*, [1914] 1 Ir. R. 305, these cases were reviewed.

Not void for perpetuity.

mentioned below (see Sects. vi, viii), it is no objection to a gift of property for a charitable purpose that the purpose may last for ever, for gifts to charities are an exception to the general principle which forbids any disposition by which property is made inalienable for an indefinite period (*m*).

But may be void for remoteness.

It must, however, be remembered that if a charitable gift is not immediate, but is made conditional upon a future and uncertain event, " it is subject to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises: if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio* " (*n*). Thus a gift for the benefit of a volunteer corps, although charitable, is void if it is made to take effect " on the appointment of the next lieutenant-colonel " (*o*). Conversely, if property is given upon trust for a charity, with a proviso that on the happening of an event which may not take place within the limits allowed by the Rule against Perpetuities, the property is to go over to private individuals, this gift over is void (*p*). If there is an immediate bequest to charity with a direction that the fund shall fall into residue if the charity fail, the direction is not void although not limited within the period of remoteness (*q*). The reason is that the original gift for charity was expressed to be for a limited period only and that, therefore, a reversion was necessarily left in the donor; but where the original gift is expressed to be perpetual and any interest would only come to the donor by a substantive gift operating by way of curtailment and destruction of the original gift, the curtailing gift is bad (*r*).

But property may be given to Charity A subject to a proviso that on the happening of a certain event it shall go over to Charity B, and the transfer will take effect notwithstanding the remoteness of the event (*s*).

So if property is effectually and absolutely devoted to charity, a direction that it shall not be applied in a certain way until after an event which may not happen within the period

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(*m*) *Thomson* v. *Shakespear*, 1 D. F. & J. 399; *Carne* v. *Long*, 2 D. F. & J. 75; *Re Clarke*, [1901] 2 Ch. 110.

(*n*) *Per* Lord Selborne, in *Chamberlayne* v. *Brockett*, L. R. 8 Ch. 211.

(*o*) *Re Lord Stratheden*, [1894] 3 Ch. 265. See also *Worthing Corporation* v. *Heather*, [1906] 2 Ch. 532.

(*p*) *Re Bowen*, [1893] 2 Ch. 491; see *Re Davies*, [1915] 1 Ch. 543.

(*q*) *Re Randell*, 38 Ch. D. 213; *Re Blunt's Trusts*, [1904] 2 Ch. 767.

(*r*) See *per* Sargant, J., in *Re Peel's Release*, [1921] 2 Ch., at p. 224.

(*s*) *Christ's Hospital* v. *Grainger*, 1 Mac. & G. 460; *Re Tyler*, [1891] 3 Ch. 252. Mr. Sweet thought that the decision in *Re Tyler* was contrary to principle (Juridical Review, xviii, 140). See also *Re Barker*, 25 T. L. R. 753.

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allowed by the Rule against Perpetuities, does not affect the validity of the gift (*t*).

Resulting trust.

Charities are to some extent an exception to the doctrine of resulting trusts, for if the income of property is given for charitable purposes, and the income afterwards increases so that there is a surplus beyond what is required, this is also treated as devoted to charity (*u*), apparently on the basis that there is a general charitable intention (*x*); but if there is no general charitable intention and there is an immediate surplus of capital, there will be a resulting trust (*y*).

What is a charity?

Stat. 43 Eliz. c. 4.

In order to ascertain what are charitable purposes, recourse is usually had to the preamble of the statute 43 Eliz. c. 4 (*z*), which enumerates various kinds of charity: *viz.*, the relief of aged, impotent, and poor people (*a*), maintenance of sick and maimed soldiers and mariners, schools of learning (*b*), free schools and scholars in universities; repair of bridges, ports, havens, causeways (*c*), churches, sea-banks (*d*), and highways; education and preferment of orphans; the relief, stock, or maintenance for houses of correction; marriages of poor maids; supportation and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners or

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(*t*) *Martin* v. *Margham*, 14 Sim. 230; *Re Gyde*, 79 L. T. 261; *Re Swain*, [1905] 1 Ch. 669; *Wallis* v. *Sol.-Gen. for N. Z.*, [1903] A. C. 173.

(*u*) See Chap. XXI.

(*x*) See *Re Monk*, [1927] 2 Ch. 197, at p. 210.

(*y*) *Re Stanford*, [1924] 1 Ch. 73; *Re British Red Cross Balkan Fund*, [1914] 2 Ch. 419 (the resulting trust was admitted).

(*z*) This statute is repealed by the Mortmain, etc., Act, 1888, but the preamble is set forth in the 13th section of the latter Act, which in effect provides that references made in any enactment or document to charities within the meaning, purview and interpretation of the Act of Elizabeth, "shall be construed as references to charities within the meaning, purview and interpretation of the said preamble."

(*a*) *Nash* v. *Morley*, 5 Bea. 177; *Re Gosling*, 48 W. R. 300. See *Re Wall*, 42 Ch. D. 510, where a gift to persons "not under fifty years of age" was held to be a good charitable gift to "aged" persons within the meaning of this statute. But the benefit of such a charity is confined to persons who are in want: see *post*, p. 206. The use of the words "aged," "impotent," or "poor," is not necessary to a good charitable gift: see *Att.-Gen.* v. *Comber*, 2 Sim. & St. 93; *Powell* v. *Att.-Gen.*, 3 Mer. 48. In *Re Estlin*, 72 L. J. Ch. 687, a gift for the support of a Home of Rest for school teachers was held good, partly because it was for the benefit of impotent persons. But in *Re Good*, [1905] 2 Ch. 60, it was held that a gift for the benefit of "old" officers of a regiment meant "former" officers, and was therefore bad. As to the meaning of the term "poor," see *Att.-Gen.* v. *Duke of Northumberland*, 7 Ch. D. 745.

(*b*) *Att.-Gen.* v. *Nash*, 3 Br. C. C. 587; *Att.-Gen.* v. *Earl of Lonsdale*, 1 Sim. 105, *post*, p. 206; *Kirkbank* v. *Hudson*, 7 Pr. 212, and the cases on educational charities cited *post*. An educational institution is not prevented from being a charity by the fact that it involves instruction in a certain religious belief: *Dilworth* v. *Comm. of Stamps*, [1899] A. C. 99; *Bradshaw* v. *Tasker*, 2 My. & K. 221; *Walsh* v. *Gladstone*, 1 Ph. 290.

(*c*) *Att.-Gen.* v. *Day*, [1900] 1 Ch. 31.

(*d*) *Wilson* v. *Barnes*, 38 Ch. D. 507.

captives (*e*); and aid or ease of any poor inhabitants, concerning payment of fifteens, setting out of soldiers, and other taxes.

Charity is not confined to the objects comprised in this enumeration; it extends to all cases within the spirit and intendment of the statute. "The method employed by the Court is to consider the enumeration of Charities in the Statute of Elizabeth, bearing in mind that the enumeration is not exhaustive. Institutions whose objects are analogous to those mentioned in the Statute are admitted to be charities; and, again, institutions which are analogous to those already admitted by reported decisions are held to be charities. The pursuit of these analogies obviously requires caution and circumspection. After all, the best that can be done is to consider each case as it arises upon its own special circumstances" (*f*).

Thus, gifts (*g*) for the erection of water-works for the use of the inhabitants of a town (*h*); or for the establishment of a life-boat (*i*), or of a botanical garden (*k*); or museum (*l*); to the trustees and for the benefit of the British Museum (*m*); to the Royal, the Geographical, and the Humane Societies (*n*); to the widows and orphans (*o*), or the poor inhabitants (*p*) of a parish ("poor" being construed those not receiving parochial relief (*q*)); or to trustees for the benefit of a parish (*r*); or

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(*e*) As in *Att.-Gen.* v. *Ironmongers' Co.*, 2 Bea. 313; *S. C.* 10 C. & F. 908, *post*, p. 225; *Att.-Gen.* v. *Gibson*, 2 Bea. 317, n. Such a charity does not include prisoners for crime, as poachers: *Thrupp* v. *Collett*, 26 Bea. 125, *ante*, p. 194.

(*f*) *Per* Chitty, J., in *Re Foveaux*, [1895] 2 Ch. 501: at p. 504. See also *per* Rigby, L.J., in *Re MacDuff*, [1896] 2 Ch. 451, at pp. 470, 471.

(*g*) Property acquired otherwise than by bounty (*e.g.*, by taxation) may form the subject of a charity; it is not the source but the purpose alone that is the criterion: *Att.-Gen.* v. *Eastlake*, 11 Hare, 205; *Re St. Botolph Without Bishopsgate Parish Estates*, 35 Ch. D. 142.

(*h*) *Jones* v. *Williams*, Amb. 651; *Mayor of Faversham* v. *Ryder*, 5 D. M. & G. 350.

(*i*) *Johnston* v. *Swann*, 3 Mad. 457; *Re Beck*, 42 T. L. R. 244.

(*k*) *Townley* v. *Bedwell*, 6 Ves. 194, where the testator had signified his expectation that the garden would be a public benefit. According to the report it would seem that the gift was held bad as being a gift of land for a charitable purpose; but Lord St. Leonards regarded the decision as grounded on the vagueness of the expression "public benefit": *Egerton* v. *Earl Brownlow*, 4 H. L. C. 242, *sed qu.*

(*l*) *Re Holburne*, 53 L. T. 212.

(*m*) *British Museum* v. *White*, 2 S. & St. 594. Compare an unreported case of *President of the United States* v. *Drummond*, cited 7 H. L. C. 155.

(*n*) *Beaumont* v. *Oliveira*, L. R. 6 Eq. 534; 4 Ch. 309.

(*o*) *Att.-Gen.* v. *Comber*, 2 S. & St. 93; *Thompson* v. *Corby*, 27 Beav. 649.

(*p*) *Att.-Gen.* v. *Clarke*, Amb. 422; see 14 Ves. 364. For other examples of charitable gifts for the benefit of poor persons, see *Waldo* v. *Caley*, 16 Ves. 206; *Gregory* v. *Att.-Gen.*, 2 Bea. 366; *Baldwin* v. *Baldwin*, 22 Bea. 413; and the cases cited *ante*, p. 198, n. (*a*), and *post*, p. 217.

(*q*) *Bishop of Hereford* v. *Adams*, 7 Ves. 324; *Att.-Gen.* v. *Price*, 3 Atk. 109; *Att.-Gen.* v. *Clarke*, Amb. 422; *Att.-Gen.* v. *Wilkinson*, 1 Bea. 370; and see *Att.-Gen.* v. *Bovill*, 1 Phill. 762; *Att.-Gen.* v. *Corporation of Exeter*, 2 Russ. 45; 3 Russ. 395; *Att.-Gen.* v. *Blizard*, 21 Bea. 233.

(*r*) *Att.-Gen.* v. *Webster*, L. R. 20 Eq. 483; *Re St. Botolph*, 35 Ch. D.

to the churchwardens in aid of the poor's rate (*s*); or for providing a workhouse (*t*); to the widows and children of seamen belonging to a port (*u*); to "poor, credible, industrious persons, residing at A., with two children or upwards, or above fifty years of age, maimed or otherwise unable to get a living" (*x*); for the benefit of poor and aged persons who have done service to the cause of science (*y*); for preaching a sermon, keeping the chimes of the church in repair, playing certain psalms, and paying the singers in church (*z*); for building an organ gallery in a church (*a*), or repairing and ornamenting a chancel (*b*), or putting in (*c*) or repairing a memorial window and mural monuments in a church (*d*), or repairing and keeping in repair a parish churchyard (*e*); or the burial grounds used by a religious sect (*f*) (including graves and headstones (*g*)); for endowing or erecting or equipping a hospital (*h*); for the reclamation of fallen women (*i*); to a society formed principally for teaching poor children and nursing the sick (*k*); to a friendly society having for its object the relief of poverty (*l*); to found prizes for essays (*m*); for deserving literary men who have been unsuccess-

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142; *Re St. Stephen, Coleman Street*, 39 Ch. D. 492; *Re Garrard*, [1907] 1 Ch. 382 (gift to vicar and churchwardens to be applied as they think fit).

(*s*) *Doe* v. *Howells*, 2 B. & Ad. 744.

(*t*) *Webster* v. *Southey*, 36 Ch. D. 9 (lease); the decision to the contrary in *Burnaby* v. *Barsby*, 4 H. & N. 690, appears inconsistent with the current of authority, and cannot be relied on.

(*u*) *Powell* v. *Att.-Gen.*, 3 Mer. 48.

(*x*) *Russell* v. *Kellett*, 3 Sm. & Gif. 264. It was held first, that the gift pointed to individuals, and some having died before payment, that there could be no execution *cy-près*; but secondly, that the gifts were charitable, and did not pass to the representatives of those who, though they survived the testatrix, died before payment. The decision on the first point is probably erroneous: see *per* Lord Herschell in *Re Rymer*, [1895] 1 Ch., at p. 32. See also *Bennett* v. *Honywood*, Amb. 708; *Mahon* v. *Savage*, 1 Sch. & L. 111, stated *post*, p. 209; and *Gregory* v. *Att.-Gen.*, 2 Bea. 366.

(*y*) *Weir* v. *Crum-Brown*, [1908] A. C. 162, stated more fully *post*, p. 216, n. (*k*).

(*z*) *Turner* v. *Ogden*, 1 Cox, 316. See also *Durour* v. *Motteux*, 1 Ves. 320; and *Re Avenon's Charity*, [1913] 2 Ch. 261 (sermon).

(*a*) *Adnam* v. *Cole*, 6 Bea. 353.

(*b*) *Hoare* v. *Osborne*, L. R. 1 Eq. 585.

(*c*) *Re King*, [1923] 1 Ch. 243.

(*d*) *Hoare* v. *Osborne*, *supra*; *Re Rigley's Trust*, 36 L. J. Ch. 147; *Re Barker*, 25 T L. R. 753 (memorial tablet). As to the meaning of ornaments of a church, see *Re Palatine Estate Charity*, 39 Ch. D. 54.

(*e*) *Re Vaughan*, 33 Ch. D. 187; *Re Douglas*, [1905] 1 Ch. 279; *Re Pardoe*, [1906] 2 Ch. 184.

(*f*) *Re Manser*, [1905] 1 Ch. 68.

(*g*) *Re Pardoe*, *supra*.

(*h*) *Pelham* v. *Anderson*, 2 Ed. 296, 1 Br. C. C. 444; *Att.-Gen.* v. *Kell*, 2 Bea. 575; *Re Unite*, 75 L. J. Ch. 163.

(*i*) *Mahony* v. *Duggan*, 11 L. R. Ir. 260.

(*k*) *Cocks* v. *Manners*, L. R. 12 Eq. 574.

(*l*) *Spiller* v. *Maude*, 32 Ch. D. 158, n.; *Re Lacy*, [1899] 2 Ch. 149. But see *Cunnack* v. *Edwards*, [1896] 2 Ch. 679, *post*, p. 232, n. (*g*).

(*m*) *Farrer* v. *St. Catherine's College*, L. R. 16 Eq. 19.

ful (*n*); for letting out land to the poor at a low rent (*o*); for the increase and encouragement of good servants (*p*); for the benefit of ministers of any denomination of Christians (*q*); for the advancement of religion (*r*); for charitable or religious purposes or institutions (*s*) : scholarships for British subjects of British descent (*t*); or for deserving Jewish girls on their marriage (*u*); or for institutions for sailors and soldiers (*x*); or for the education of children of employees in a company, and the benefit of incapacitated employees (*y*); or for Presbyterian widows and orphans (*z*); or for an annual treat for school children (*a*); or for an educational scheme for the poor (*b*); or for the City Mission Cause in London (*c*); or for a scholarship for music (*d*); or for the education of the testator's relations at a named college (*e*); or for a cats' home (*f*); or for healthy recreation (*g*); or for fives courts, and a prize for athletic sports at a school (*h*); or for the Shakespeare Memorial Trust (*i*); or for dinners for a clerical society (*k*); or for the purposes of the National Trust Act, 1907 (*l*); or for the benefit of New South Wales returned soldiers (*m*); or for a residence for ladies of limited means (*n*); or for prizes for best kept garden (*o*); for missionary objects (*p*); for the benefit, advancement, and

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(*n*) *Thompson* v. *Thompson*, 1 Coll. 395.
(*o*) *Crafton* v. *Frith*, 20 L. J. Ch. 198.
(*p*) *Loscombe* v. *Wintringham*, 13 Beav. 87.
(*q*) *Att.-Gen.* v. *Hickman*, 2 Eq. Abr. 193; *Att.-Gen.* v. *Gladstone*, 13 Sim. 7; *Att.-Gen.* v. *Cock*, 2 Ves. 273; *Att.-Gen.* v. *Lawes*, 8 Hare, 32; *Shrewsbury* v. *Hornby*, 5 Hare, 406; *Grieves* v. *Case*, 4 Br. C. C. 67, 2 Cox, 301; 1 Ves. jun. 548; *Milbank* v. *Lambert*, 28 Bea. 206; *Thornber* v. *Wilson*, 3 Drew. 245, 4 *ib.* 350; *secus* if it be to the person *now* minister, *semb. ib.* 351.
(*r*) *Re Manser*, [1905] 1 Ch. 68.
(*s*) *Re Salter*, [1911] 1 Ir. R. 289; *Rickerby* v. *Nicholson*, [1912] 1 Ir. R. 343; *McPhee's Trustees* v. *McPhee*, [1912] S. C. 75.
(*t*) *Re Churchill*, 34 T. L. R. 186.
(*u*) *Re Cohen*, 36 T. L. R. 16.
(*x*) *Re Smith*, 36 T. L. R. 416.
(*y*) *Re Rayner*, 122 L. T. 577.
(*z*) *Jackson* v. *Att.-Gen.*, [1917] 1 Ir. R. 332.
(*a*) *Re Mellody*, [1918] 1 Ch. 228.
(*b*) *Chalmers Trustees* v. *Turriff School Board*, [1917] S. C. 676.
(*c*) *Re Hall*, 31 T. L. R. 396.
(*d*) *Re Harrison*, 113 L. T. 308.
(*e*) *Re Lavelle*, [1914] 1 Ir. R. 194.
(*f*) *Swifte* v. *Att.-Gen. for Ireland* (*No.* 2), [1912] 1 Ir. R. 133; *Adamson* v. *Melbourne, etc., Board of Works*, [1929] A. C. 142 (home for lost dogs).
(*g*) *Shillington* v. *Portadown U. C.*, [1911] 1 Ir. R. 247; contrast *Re Nottage*, [1895] 2 Ch. 649; *Re Clifford*, 106 L. T. 14.
(*h*) *Re Mariette*, [1915] 2 Ch. 284.
(*i*) *Re Shakespeare Memorial Trust*, [1923] 2 Ch. 398.
(*k*) *Re Charlesworth*, 101 L. T. 908.
(*l*) *Re Verrall*, [1916] 1 Ch. 100.
(*m*) *Verge* v. *Somerville*, [1924] A. C. 489.
(*n*) *Re Gordon*, [1914] 1 Ch. 662.
(*o*) *Re Pleasants*, 39 T. L. R. 675.
(*p*) *Re Kenny*, 97 L. T. 130, not following *Scott* v. *Brownrigg*, 9 L. R. Ir. 246; *Re Rees*, [1920] 2 Ch. 59; *Renouf's Trustees* v. *Haining*, [1919] S. C.

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propagation of education and learning in every part of the world (*q*); for the benefit of a regimental mess (*r*); or sport for a regiment (*s*); or improving condition of soldiers (*t*), or prizes for army cadets or officers (*t*); or a volunteer corps (*u*); or a corps of commissionaires (*x*); for the advancement of education in economic and sanitary science (*y*), or in law (*z*); for establishing and upholding an institution for the investigation and cure of diseases of quadrupeds and birds useful to man, and for maintaining a lecturer thereon (*a*); or for supporting societies having for their object the suppression and abolition of vivisection (*b*); or otherwise for the benefit of animals generally (*c*); or for the encouragement of the practice of vegetarianism (*d*); and gifts in aid of the public revenue of the State (*e*); and finally, gifts for any purpose which tends towards public religious instruction or edification (*f*), although combined with other objects—such as a gift for the furtherance of Conservative principles and religious and mental improvement (*g*); or for ringing church bells in commemoration of the

497. See *Allan's Executors* v. *Allan*, [1908] Ct. Sess. C. 807 (foreign missions); *Dunne* v. *Duignan*, [1908] 1 Ir. R. 228 (foreign missions); *Re Redish*, 26 T. L. R. 42.

(*q*) *Whicker* v. *Hume*, 14 Bea. 509, 1 D. M. & G. 506, 7 H. L. Ca. 124. "Learning" was taken to mean "being taught," not "knowledge," which would have been too indefinite.

(*r*) *Re Good*, [1905] 2 Ch. 60; *Re Donald*, [1909] 2 Ch. 410. But a gift of a dwelling for the use of old officers of a regiment at a small rent during their life is not a charitable gift: *Re Good*, [1905] 2 Ch. 60.

(*s*) *Re Gray*, [1925] Ch. 362. (*t*) *Re Barker*, 25 T. L. R. 753.

(*u*) *Re Lord Stratheden*, [1894] 3 Ch. 265. Compare *Re Stephens*, [1892] W. N. 140 (gift to National Rifle Association).

(*x*) *Re Clarke*, [1901] 2 Ch. 110.

(*y*) *Re Berridge*, 63 L. T. 470. As to gifts for educational purposes, see also *ante*, p. 198, n. (*b*).

(*z*) *Smith* v. *Kerr*, [1902] 1 Ch. 774.

(*a*) *London University* v. *Yarrow*, 23 Beav. 159, 1 De G. & J. 72. And see *Marsh* v. *Means*, 3 Jur. (N.S.) 790.

(*b*) *Re Foveaux*, [1895] 2 Ch. 501; *Glasgow Society for Prevention of Cruelty to Animals* v. *National Anti-Vivisection Society*, [1915] S. C. 757.

(*c*) *Re Douglas*, 35 Ch. D. 472; see *Armstrong* v. *Reeves*, 25 L. R. Ir. 325; *Re Wedgwood*, [1915] 1 Ch. 113; but see *Re Grove-Grady*, [1929] 1 Ch. 557. A gift for the general benefit of animals belonging to a particular class (*e.g.*, dogs) is good, but not a gift for the support of particular animals, *e.g.*, the testator's horses and hounds: *Re Dean*, 41 Ch. D. 552.

(*d*) *Re Cranston*, [1898] 1 Ir. R. 431; *Re Slatter*, 21 T. L. R. 295.

(*e*) *Thelluson* v. *Woodford*, 4 Ves. 227; *Nightingale* v. *Goulborn*, 5 Hare, 484, 2 Phil. 594; *Newland* v. *Att.-Gen.*, 3 Mer. 684; *Ashton* v. *Lord Langdale*, 4 De G. & S. 402.

(*f*) *Att.-Gen.* v. *City of London*, 1 Ves. jun. 243; *Powerscourt* v. *Powerscourt*, 1 Moll. 616; *Baker* v. *Sutton*, 1 Keen, 232; *Att.-Gen.* v. *Stepney*, 10 Ves. 22; *Townsend* v. *Carus*, 3 Hare, 257; *Lloyd* v. *Lloyd*, 2 Sim. (N.S.) 266; *Wilkinson* v. *Lindgren*, L. R., 5 Ch. 570; *Cocks* v. *Manners*, L. R., 12 Eq. 585, *per* Wickens, V.-C.; *Re Lea*, 34 Ch. D. 528; *Commissioners, etc.* v. *Pemsel*, [1891] A. C. 531; *Re White*, [1893] 2 Ch. 41; *Re Darling*, [1896] 1 Ch. 50.

(*g*) *Re Scowcroft*, [1898] 2 Ch. 638; *Re Darling*, [1896] 1 Ch. 50 ("to the poor and the service of God"); *Re Sinclair's Trust*, 13 L. R. Ir. 150; *Re Lea*, 34 Ch. D. 528. But the Primrose League is not a charity: *Re Jones*, 45 T. L. R. 259.

restoration of the monarchy (*h*)—have been respectively held to be charitable. And in the case of charitable gifts for religious purposes the Court makes no distinction between one sort of religion, or one sect, and another (*i*). Their promotion or advancement are all equally "charitable," provided their doctrines are not subversive of all religion, or all morality (*k*). It seems that even a gift for religious purposes generally is *prima facie* valid (*l*). An advowson may be the subject of a charitable trust if it is to be held for the benefit of a certain place, such as a particular parish (*m*). But a simple devise of an advowson upon trust from time to time to present a fit and proper person to the living, is not a charitable trust (*n*). Whether such a trust would be made a charitable one by restricting the choice of incumbents to clergymen of a particular type of thought, or to members of a particular society, seems doubtful (*o*).

Religious charities.

Advowson.

A charity may be created for the benefit of persons resident in a foreign country (*p*), but the English Courts will not enforce its administration (*q*).

Foreign charity.

It was at one time supposed that though a gift for public purposes generally was too vague and could not be supported, that the gift would be good if confined to public purposes within a specified locality (*r*); but it has been decided in the

Public purposes in a locality.

(*h*) *Re Pardoe*, [1906] 2 Ch. 184.

(*i*) See *Att.-Gen.* v. *Pearson*, 3 Mer. 353; *West* v. *Shuttleworth*, 2 My. & K. 684. The case of *Da Costa* v. *De Pas*, Amb. 228, is referred to, *post*, p. 234. A gift to a militant religious body (such as an anti-popery association) may be a good charitable gift: *Re Delmar Charitable Trust*, [1897] 2 Ch. 163.

(*k*) *Per* Romilly, M.R., *Thornton* v. *Howe*, 31 Bea. 19, 20. In *Briggs* v. *Hartley*, 19 L. J. Ch. 416, a legacy for the best essay on the Sufficiency of Natural Theology when treated as a Science, was held inconsistent with Christianity and void. But this would probably not be followed: *Bowman* v. *Secular Society*, [1917] A. C. 416. In *Pare* v. *Clegg*, 29 Bea. 589, the doctrines of Robert Owen (as to which see also *Russell* v. *Jackson*, 10 Hare, 204) were held by Romilly, M.R., to be visionary and irrational but not illegal as being irreligious or immoral. The Court is sometimes compelled to declare good as a charitable bequest what it deems of very doubtful public utility: *per* Lord Selborne, L. R. 16 Eq. 24.

(*l*) See *Arnott* v. *Arnott*, [1906] 1 Ir. R. 127, and cases cited *supra*, n. (*f*), and *post*, p. 224. The decision in *Grimond* v. *Grimond*, [1905] A. C. 124, turned on Scottish law.

(*m*) See *Re St. Stephen*, 39 Ch. D. 492; *Hunter* v. *Att.-Gen.*, [1899] A. C. 309, reversing the decision of the C. A. in *Re Hunter*, [1897] 2 Ch. 105. Lewis on Perpetuities, 693 *seq.*; Gray on Perpetuities, § 627.

(*n*) *Re Church Patronage Trust*, [1904] 1 Ch. 41; 2 Ch. 643.

(*o*) *Ibid.* Questioning the decision of the Court of Appeal in *Re Hunter*, [1897] 2 Ch. 105, *supra*, n. (*m*).

(*p*) *Re Geck*, 69 L. T. 819, where the older authorities (including *New* v. *Bonaker*, L. R., 4 Eq. 655) are referred to. See *Whicker* v. *Hume*, *ante*, p. 202, n.; *Re Mirrlees' Charity*, [1910] 1 Ch. 163; and *Re Vagliano*, [1905] W. N. 179.

(*q*) *Post*, pp. 225, 226.

(*r*) See *per* Romilly, M.R., in *Dolan* v. *MacDermott*, L. R. 5 Eq., at p. 62, *per* Swinfen Eady, J., in *Re Allen*, [1905] 2 Ch. 400.

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Scottish case of *Houston* v. *Burns* (*s*), that a bequest for public purposes to be selected by a third party, though limited to a particular locality, is void for uncertainty. This appears to overrule many of the cases in the footnote (*t*), and it is difficult to be certain which of them remain good law. *Houston* v. *Burns* is discussed in Tyssen on Charitable Bequests, 2nd Edit., pp. 106, 107; and the effect of it was avoided in *Re Bennett* (*u*) by construing the words "or any public objects" as not being disjunctive.

Income tax cases.

Questions whether particular institutions are charitable also arise under various taxing statutes (*x*). In the following cases the institution or body concerned has been held to be charitable: *I. R. Commissioners* v. *Glasgow Musical Festival Association* (*y*); *I. R. Commissioners* v. *Falkirk Temperance Café Trust* (*z*); *I. R. Commissioners* v. *Peebleshire Nursing Association* (*a*); *I. R. Commissioners* v. *Yorkshire Agricultural Society* (*b*); *I. R. Commissioners* v. *Society for Relief of Widows and Orphans of Medical Men* (*c*); *I. R. Commissioners* v. *Medical Society for West Riding of Yorkshire* (*c*); *The Scottish Woollen Technical College, Galashiels* v. *I. R. Commissioners* (*d*); *The Royal Agricultural Society of England* v. *Wilson* (*e*).

Other institutions held charitable under taxing statutes are: The University College of North Wales (*f*); a boarding house at reduced charges for convalescents (*g*); establishments for persons belonging to the Moravian brotherhood (*h*); a convalescent home established by an unregistered Friendly

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(*s*) [1918] A. C. 337.

(*t*) *Att.-Gen.* v. *Earl of Lonsdale*, 1 Sim. 105; *Att.-Gen.* v. *Hotham*, T. & R. 209; *Att.-Gen.* v. *Webster*, L. R. 20 Eq. 483; *Wrexham Corporation* v. *Tamplin*, 28 L. T. 761; *Howse* v. *Chapman*, 4 Ves. 542; *Att.-Gen.* v. *Heelis*, 2 S. & St. 67; *Mitford* v. *Reynolds*, 1 Phil. 185. *Per* Lord Cottenham in *Att.-Gen.* v. *Aspinall*, 2 My. & Cr. 613, at pp. 622, 623; *Att.-Gen.* v. *Corporation of Shrewsbury*, 6 Bea. 220; *Att.-Gen.* v. *Corporation of Carlisle*, 2 Sim. 437; *British Museum* v. *White*, 2 S. & St. 594; *Goodman* v. *Mayor of Saltash*, 7 A. C. 633; *Wilson* v. *Barnes*, 38 Ch. D. 507; *Re Christchurch Inclosure Act*, 38 Ch. D. 520; *Re Norwich Town Close Estate Charity*, 40 Ch. D. 298; *Re Mann*, [1903] 1 Ch. 232; *Re Allen*, [1905] 2 Ch. 400.

(*u*) [1920] 1 Ch. 305.

(*x*) This subject is treated more fully in Chap. XIII of Tudor on Charities and Mortmain.

(*y*) [1926] S. C. 920.

(*z*) [1927] S. C. 261.

(*a*) [1927] S. C. 215.

(*b*) [1928] 1 K. B. 611.

(*c*) 136 L. T. 60.

(*d*) [1926] S. C. 924.

(*e*) 40 T. L. R. 763.

(*f*) *R.* v. *Income Tax Commissioners*, 100 L. T. 585.

(*g*) *I. R. Commissioners* v. *Roberts Marine Mansions' Trustees*, 43 T. L. R. 270.

(*h*) *Income Tax Commissioners* v. *Pemsel*, [1891] A. C. 53.

Society (*i*); a home for ladies in reduced circumstances (*k*); an orphanage for children of deceased railway servants (*l*); funds for necessitous freemasons or their dependants (*m*); a church hall where Badminton was played twice a week for six months in the year (*n*); and (in Scotland) charitable or benevolent institutions (*o*).

On the other hand, in the following cases the institution or body concerned was held not charitable: *General Medical Council* v. *I. R. Commissioners* (*p*); *R.* v. *Special Commissioners of Income Tax*; *Ex p. the Headmasters' Conference* (*q*); *I. R. Commissioners* v. *Temperance Council of Christian Churches of England and Wales* (*r*); and *Re The Linen and Woollen Drapers, etc., Institution* (*s*).

So also a college for the education of young men for the Presbyterian ministry who paid small fees (*t*); and profits from allotments held in trust for the freemen of the City of York and voluntarily applied by them for the benefit of poor persons and their widows (*u*); and the Simplified Spelling Society (*v*) were held not charitable.

Where there was a settlement giving property to trustees with a power of appointment to A, and in default for the benefit of the Wesleyan Methodist Church, it was held that although the power was in fact exercised in favour of a charity, yet the deed did not establish a trust "for charitable purposes only" (*x*).

A charity may have a double purpose.

It has been said that "charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education and learning; trusts for the advancement of religion; and trusts for other purposes of general public utility, not falling under any of the preceding heads (*y*). But these divisions are not mutually exclusive, and

(*i*) *Royal Antediluvian Order of Buffaloes* v. *Owens*, [1928] 1 K. B. 446.
(*k*) *Shaw* v. *Mayor of Halifax*, [1915] 2 K. B. 170 (rates).
(*l*) *Hall* v. *Derby Sanitary Authority*, 16 Q. B. D. 163 (rates).
(*m*) *Grand Lodge of Masons* v. *I. R. Commissioners*, [1912] S. C. 1064.
(*n*) *Northern Ireland Valuation Commissioners* v. *Fisherwick Presbyterian Church Trustees*, [1927] N. Ir. 76.
(*o*) *Jackson's Trustees* v. *Lord Advocate*, [1926] S. C. 579.
(*p*) 97 L. J. K. B. 578. See also *Sully* v. *Royal College of Surgeons, Edinburgh*, 3 Tax Cases 173.
(*q*) 41 T. L. R. 651. (*r*) 136 L. T. 27.
(*s*) 58 L. T. 949 (corporation duty); see also *I. R. Commissioners* v. *Forrest*, 15 A. C. 334.
(*t*) *Magee College Trustees* v. *Valuation Commissioners*, 19 W. R. 328 (rates).
(*u*) *I. R. Commissioners* v. *Scott*, [1892] 2 Q. B. 152 (corporation duty).
(*v*) *Hunter's Trustees* v. *I. R. Commrs.*, 45 T. L. R. 344.
(*x*) *R.* v. *Special Commissioners of Income Tax*; *Ex p. Rank's Trustees*, 127, L. T. 651.
(*y*) See the argument of Sir J. Romilly, in *Morice* v. *Bishop of Durham*, quoted in *Re Macduff*, [1896] 2 Ch. p. 466, and paraphrased by Lord Macnaghten in *Commrs. for I. T.* v. *Pemsel*, [1891] A. C., at p. 583.

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there may be a charity for purposes which are both eleemosynary and ecclesiastical (*z*). On the other hand, it is not every object of public utility that constitutes a good charity (*a*). Indeed, it is difficult to lay down any principle as to what constitutes a valid charitable trust for purposes of general public utility. Gifts in aid of the public revenue or local rates and other burdens are charitable (*b*). On the other hand, a trust may be void because its benefits are so limited that it amounts to a private charity (*c*), or because it is too indefinite and vague (*d*).

Charity need not be eleemosynary.

It is evident from the preceding examples that, to constitute a charity in the legal sense, the poor need not be (though they commonly are) its sole or especial objects (*e*); for example, a trust for the advancement of education or learning is a good charitable purpose, without being restricted to destitute persons (*f*). And obviously it would be no objection to a gift for a public purpose that it might incidentally benefit wealthy persons (*g*). But a gift the main object of which is to add to the income or resources of persons who are, or may be, in possession of a competence, is not charitable (*h*). In the popular sense of the word, however, "charity" connotes the idea of poverty, and this sometimes affects the construction of gifts which are obviously intended to be charitable, so that a gift for the benefit of a certain class of the inhabitants of a place may be construed to mean poor persons belonging to that class; thus a legacy to "the widows and orphans" of a certain place was held to mean the poor widows and orphans of that place (*i*); so a gift

Widows and orphans.

(*z*) *Re Perry Almshouses*; *Re Ross's Charity*, [1899] 1 Ch. 21, where the question arose as to the meaning of "ecclesiastical charity" in section 75 of the Local Government Act, 1894.

(*a*) *Re Macduff*, [1896] 2 Ch. 451; *Re Foveaux*, [1895] 2 Ch. 501; *Re Good*, [1905] 2 Ch. 60.

(*b*) *Doe* v. *Howells*, 2 B. & Ad. 744; *ante*, p. 202, n. (*e*).

(*c*) *Post*, p. 212, n. (*a*).

(*d*) See *Morice* v. *Bishop of Durham*, 9 Ves. 339, 10 Ves. 532; *post*, p. 213; *Vezey* v. *Jamson*, 1 S. & St. 69, *post*, p. 219. The case of *Browne* v. *Yeale*, 7 Ves. 50, n., would probably not now be followed; see 10 Ves. 27, 533 (*per* Lord Eldon); [1896] 2 Ch., p. 471 (*per* Rigby, L.J.).

(*e*) See *Chesterman* v. *Federal Commissioners of Taxation*, [1926] A. C. 128. As to charities for poor persons, see *post*, p. 207.

(*f*) *Att.-Gen.* v. *Earl of Lonsdale*, 1 Sim. 109; *Kirkbank* v. *Hudson*, 7 Price, 212, and the cases cited *ante*, p. 206, nn. (*q*) (*y*) (*z*). Compare *Re Estlin*, 72 L. J. Ch. 687 (Home of Rest for Teachers).

(*g*) *Verge* v. *Somerville*, [1924] A. C. 496; "poor persons" may comprise persons of limited means: *Re Clarke*, [1923] 2 Ch. 407.

(*h*) *Att.-Gen.* v. *Duke of Northumberland*, 7 Ch. D., at p. 752; *Re Macduff*, [1896] 2 Ch., at p. 471. See also *Re Gassiot*, 70 L. J. Ch. 242, and *Re Good*, [1905] 2 Ch. 60. As to trade unions, friendly societies, etc., see *post*, p. 212.

(*i*) *Att.-Gen.* v. *Comber*, 2 S. & St. 93; *Powell* v. *Att.-Gen.*, 3 Mer. 48; *Thompson* v. *Corby*, 27 Bea. 649; *Re Dudgeon*, 74 L. T. 613. See *Liley* v. *Hey*, *post*, p. 208; *Re Wall*, 42 Ch. D. 510, *ante*, p. 198, n. (*a*).

for the benefit of blind persons of a place (*k*), and a gift of 5s. a week to the oldest inhabitants of G (*l*).

Blind.

Oldest.

A legacy payable once for all may be charitable, as well as one given for the creation of a perpetual trust; as, a legacy to the widows and orphans of a named place (*m*); or to six honest and sober clergymen that are not provided with a living of £40 (*n*); such gifts could not in their nature have proceeded from motives of personal bounty to particular individuals.

Legacy may be charitable though payable at once to individuals.

In *Re Williams* (*o*), the question arose whether a bequest for the purpose of being applied in paying off the debts of dissenting chapels within a certain area was confined to chapels built or debts incurred during the testator's lifetime; it was held that it was not. Where a testator bequeaths a lump sum for a charitable purpose he may, by appropriate words, show an intention that it is to be invested so as to create an endowment; or where he bequeaths £1,000 to "'found' a bed in a hospital" (*p*).

Charities for poor persons generally.

A gift for the benefit of poor persons generally is a good charitable gift (*q*). And a gift for the benefit of one or more poor persons belonging to a certain locality, or to a certain station in life or vocation, to be selected in manner directed by the testator, is also a good charitable gift (*r*). So a bequest to form a pension or superannuation fund for "old and worn-out clerks" in the employment of a certain firm, is a good charitable gift, being for the benefit of a section of the public (*s*). But in order that a gift for the benefit of poor persons belonging to a certain class may be valid, it must be for the benefit of persons who are actually poor, and not for the benefit of the least wealthy of the wealthy class; therefore, a bequest for the benefit of "the poorest" of the testator's kindred cannot be applied for the benefit of any kindred who are not really poor (*t*). And persons

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(*k*) *Re Elliott*, 102 L. T. 528; *Re Fraser*, 22 Ch. D. 827; see also *Barber* v. *Chudley*, 128 L. T. 766.

(*l*) *Re Lucas*, [1922] 2 Ch. 52.

(*m*) *Att.-Gen.* v. *Comber*, 2 S. & St. 93; *Russell* v. *Kellett*, 3 Sm. & G. 264.

(*n*) *Att.-Gen.* v. *Glegg*, Amb. 584.

(*o*) 26 L. T. R. 307.

(*p*) *Att.-Gen.* v. *Belgrave Hospital*, [1910] 1 Ch. 73.

(*q*) *Att.-Gen.* v. *Matthews*, 2 Lev. 167; *Att.-Gen.* v. *Rance*, cited Amb. 422.

(*r*) See the cases cited above, notes (*i*) (*m*) (*n*); *Att.-Gen.* v. *Pearce*, 2 Atk. 87; *Baldwin* v. *Baldwin*, 22 Bea. 413. In *Att.-Gen.* v. *Brandreth*, 1 Y. & C. C.C. 200, it was held that the trustees had not exercised their discretion properly.

(*s*) *Re Gosling*, 48 W. R. 300; but see *Re Gassiot*, 70 L. Ch. 242.

(*t*) *Att.-Gen.* v. *Duke of Northumberland*, 7 Ch. D. 745, dissenting from *dictum* of Wickens, V.-C., in *Gillam* v. *Taylor*, L. R. 16 Eq. 581.

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in receipt of parochial relief are, *prima facie*, not entitled to share in a bequest for poor persons (*u*).

In *Thomas* v. *Howell* (*x*), the testator bequeathed £200 to each of ten poor clergymen of the Church of England, to be selected by his friend, J. O.; if these were charitable legacies, they would have had to abate; Malins, V.-C., held that the legacies were not charitable, thinking, apparently, that as soon as the ten poor clergymen were selected by J. O., the legacies took effect in the same way as if their names had been inserted in the will; the V.-C. drew a distinction in this respect between a legacy payable at once, and a legacy for the maintenance of a permanent charity. This view, however, is contrary to the decision in *Att.-Gen.* v. *Glegg* (*y*), and is, it is submitted, unsound.

Liley v *Hey.*

In *Liley* v. *Hey* (*z*), the testator devised real estate to trustees upon trust out of the rents to make certain annual payments and to distribute the remainder amongst the families of twenty-four persons, named in the will, "according to their circumstances, as in the opinion of the said trustees they may need such assistance." It was held by Wigram, V.-C., that this was not a devise for charitable purposes within the meaning of the Mortmain Act, and that the trust was good for so long a period as the Rule against Perpetuities would allow, by which he appears to have meant that it was good during the lives of the persons who took immediately on the testator's death. The decision has been questioned (*a*) on the ground that it is inconsistent with *Isaac* v. *Defriez* (*b*) and *Att.-Gen.* v. *Price* (*c*), but it is submitted that it may be supported on the theory that the testator meant the devise to be for the benefit of the persons designated by him who should be living at the time of his death, for the trust was not one of selection, but of distribution; the objects of it were designated by the testator himself and were not

(*u*) *Ante*, p. 199, n. (*q*).

(*x*) L. R., 18 Eq. 198.

(*y*) Amb. 584. The V.-C. stated that the legacy to sixty poor clergymen in *Att.-Gen.* v. *Baxter* (1 Eq. Ca. Abr. 96, pl. 9, 1 Vern. 248, *S. C. Att.-Gen.* v. *Hughes*, 2 *ib.* 105) was held not to be charitable. Lord Hardwicke's note of the decision is that it was good, because really a legacy to sixty particular ejected ministers to be named by Baxter, and "as if a legacy of those sixty individuals" (7 Ves. 76); but that appears to be in answer to the argument (1 Vern. 249) that "to suffer them to take by such a devise was almost to make a corporation of them, and would keep them in a perpetual schism." And as to the decision of the Court below that the clergyman could not take, elsewhere (1 Ves. sen. 537) he says of the case: "The Court held the *charitable use* was not contrary to law."

(*z*) 1 Ha. 580. See *Re Good*, [1905] 2 Ch. 60, *ante*, p. 198, n. (*a*).

(*a*) *Gillam* v. *Taylor*, L. R. 16 Eq. 581. The judgment of Wickens, V.-C., in this case has in its turn been criticised by Jessel, M.R., in *Att.-Gen.* v. *Duke of Northumberland*, 7 Ch. D. 745.

(*b*) Amb. 595.

(*c*) 17 Ves. 371.

necessarily destitute or infirm persons (*d*). If, on the other hand, the testator meant to create a trust for the benefit of the descendants *ad infinitum* of the persons named by him, then it would have been void as a perpetuity (*e*).

Poor relations.

A gift for the perpetual benefit of the poor relations of the testator or any other person is a good charitable gift (*f*), subject, of course, to the rule that the persons entitled to participate in it must be actually and not merely relatively poor, and that if there is more than enough to provide for the persons so entitled, the surplus must be applied in some manner to be determined by the Court (*g*).

An immediate gift of property for the testator's poor relations stands on a different footing, and it is not easy to extract a definite principle from the decisions. According to several old cases, such a gift is not charitable, but is saved from being void for uncertainty by being confined to the testator's statutory next-of-kin, and this even where the selection and distribution are to be made by a person designated for the purpose by the testator (*h*). According to other authorities, such a gift is a charitable bequest (*i*), and if there is a person designated by the testator to distribute the legacy, he may select any of the testator's poor relations, however remote (*k*).

Mahon v. *Savage*.

In *Mahon* v. *Savage* (*l*), a testator bequeathed to his executor £1,000, to be distributed among his (the testator's) poor relations, or such other objects of charity as should be mentioned in his private instructions. He left no instructions; and it was held by Lord Redesdale that the testator's design was to give to them as objects of charity, and not merely as relations; that a relation within the statute who had become rich before distribution was not entitled to a share, and that a share was not

(*d*) See *Re Gassiot*, 70 L. J. Ch. 242; *Bennett* v. *Honywood*, Amb. 708.

(*e*) Compare *Re Good*, [1905] 2 Ch. 60, where a gift for the benefit of old officers of a regiment was held void: and *Laverty* v. *Laverty*, [1907] 1 Ir. R. 9, where a trust for the benefit of any persons having certain surnames was held void.

(*f*) *Isaac* v. *Defriez*, Amb. 595; *White* v. *White*, 7 Ves. 423; *Att.-Gen.* v. *Price*, 17 Ves. 371; *Gillam* v. *Taylor*, L. R. 16 Eq. 581.

(*g*) *Att.-Gen.* v. *Duke of Northumberland*, 7 Ch. D. 745, and the section of the doctrine of *cy-près* in this chapter.

(*h*) *Carr* v. *Bedford*, 2 Ch. R. 146; *Griffith* v. *Jones*, *ib.* 394; *Brunsden* v. *Woolredge*, Amb. 507. That charity was not the ground of Sir T. Sewell's judgment in *Brunsden* v. *Woolredge* is clear; for the subject of gift under the will of William (dated 1757) included money to arise by sale of land, a gift of which to charitable uses would have been void by 9 Geo. 2, c. 36 (1736).

(*i*) *Mahon* v. *Savage*, 1 Sch. & L. 111. Mr. Jarman (1st ed., vol. ii, p. 51) cites a case of *Hall* v. *Att.-Gen.*, Rolls, July 28, 1829, in which Leach, M.R., held that a devise of real estate to trustees "in trust to pay the rents to such of my poor relations as my trustees shall think most deserving," was a charitable trust, and therefore void as a gift of an interest in land.

(*k*) *Att.-Gen.* v. *Buckland*, cited Amb. 71.

(*l*) 1 Sch. & L. 111.

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transmissible to representatives (*i.e.*, of an object who died before distribution). He also thought that the executors had a discretionary power of distribution, and need not include all the testator's poor relations, and that poor relations beyond the statute might be admitted. Mr. Jarman remarks (*m*): "This case is clearly distinguishable from a simple gift to poor relations; for the additional words denoted that charity was the main object of the testator."

Selection of poor relations by Court.

If there is no person designated by the testator to distribute the legacy, and the Court is therefore called upon to make the distribution, it will be confined to the statutory next-of-kin (*n*). If the estate is being administered by the Court, the person to whom the testator has given the power of selection will be directed by the Court to prepare a scheme (*o*). In some cases, where there is no person appointed by the testator to make the distribution, the Court has directed the Master to prepare a scheme (*p*), while in other cases it has simply divided the legacy among the statutory next-of-kin (*q*).

What are not charitable uses.

The following are examples of gifts which are not charitable: to the Pope, "to use in carrying out his sacred office" (*r*); to a convent of nuns whose sole object is sanctifying their own souls, and not performing any external duty of a charitable nature (*s*); for the purchase of advowsons or presentations (*t*) unless they are to be held on a charitable trust (*u*); for the erection or repair of a monument, vault, or tomb (*x*), whether it be to the memory

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(*m*) First edition, vol. ii, p. 51.

(*n*) *Harding* v. *Glyn*, 1 Atk. 469; *Edge* v. *Salisbury*, Amb. 70 (where the gift was to "my nearest relations"); *Widmore* v. *Woodroffe*, Amb. 636; *Mahon* v. *Savage*, 1 Sch. & L. 111.

(*o*) *Brunsden* v. *Woolredge*, Amb. 507; *Mahon* v. *Savage*, *supra*.

(*p*) *Att.-Gen.* v. *Buckland*, cit. Amb. 71.

(*q*) *Widmore* v. *Woodroffe*, Amb. 636.

(*r*) *Re Moore*, [1919] 1 Ir. R. 316.

(*s*) *Cocks* v. *Manners*, L. R. 12 Eq. 574. Compare *Morrow* v. *M'Conville*, L. R. Ir. 11 Eq. 236, and the cases there cited: *Re Joy*, 60 L. T. 175. But a convent or other like body may combine charitable objects with private religious exercises so as to be a charitable institution: *Cocks* v. *Manners*, *supra*; *Re Delany*, [1902] 2 Ch. 642. See *Carbery* v. *Cox*, 3 Ir. Ch. 231; *Roche* v. *M'Dermott*, [1901] 1 Ir. R. 394; and the other cases on gifts to monastic orders cited *ante*, p. 196, n. (*l*). As to gifts to the members of a religious society as individuals, see *post*, pp. 214, 249.

(*t*) *Re Hunter*, [1897] 1 Ch. 518, 2 Ch. 105, *S. C.* nom. *Hunter* v. *Att.-Gen.*, [1899] A. C. 309. There were other objects to which the bequest might have been applied, and some of these objects were charitable, but the gift failed because the objects were not separated from the non-charitable objects: see *post*, p. 218; *Re Church Patronage Trust*, [1904] 2 Ch. 643.

(*u*) As in *Re St. Stephen*, 39 Ch. D. 492. As to what constitutes a charitable trust in the case of an advowson, see above, p. 203.

(*x*) *Hoare* v. *Osborne*, L. R. 1 Eq. 585; *Re Rigley's Trust*, 36 L. J. Ch. 147; *Re Rogerson*, [1901] 1 Ch. 715; *Toole* v. *Hamilton*, [1901] 1 Ir. R. 383; *Re Barker*, 25 T. L. R. 753. Such a bequest is not within the Gifts for Churches Act, 1803; *Re Rigley's Trust*, *supra*. A gift for objects connected with a church is not charitable: *Re Bain*, 45 T. L. R. 302.

or for the interment of the donor alone (*y*), or of himself and his family and relations (*z*), unless it forms part of the fabric or ornament of the church (*a*). Again, bequests for purposes of hospitality (*b*), or benevolence (*c*), or benevolence and liberality (*d*), or general utility (*e*), or for pious purposes (*f*), or for public (*g*), or philanthropic (*h*), or patriotic (*i*) purposes, or for "emigration uses" (*k*), or for the encouragement of a sport or pastime (*l*), or for holiday expenses of workpeople in a company (*m*), or the Royal College of Surgeons in Ireland (*n*), or the maintenance of a masonic temple (*o*), or to train and develop suitable persons as mediums (*p*), or for the benefit of such persons and for such public purposes as the Governor of South Australia should direct (*q*), or for an angling society (*r*), or a City livery company (*s*), or sweets for children (*t*), or a police pension fund (*u*), are not charitable bequests; and a gift to one of the

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(*y*) *Mellick* v. *President of the Asylum*, Jac. 180; *Adnam* v. *Cole*, 6 Bea. 353; *Lloyd* v. *Lloyd*, 2 Sim. (N.S.) 255; *Trimmer* v. *Danby*, 25 L. J. Ch. 424.

(*z*) See *Gravenor* v. *Hallum*, Amb. 643; *Doe* d. *Thompson* v. *Pitcher*, 3 M. & Sel. 407, 2 Marsh. 61, 6 Taunt. 359; *Rickard* v. *Robson*, 31 Bea. 244; *Fowler* v. *Fowler*, 33 Bea. 616; *Hoare* v. *Osborne*, L. R., 1 Eq. 585; *Re Rigley's Trust*, 36 L. J. Ch. 147; *Fisk* v. *Att.-Gen.*, L. R., 4 Eq. 521; *Dawson* v. *Small*, L. R. 18 Eq. 114; *Re Vaughan*, 33 Ch. D. 187; *Re Tyler*, [1891] 3 Ch. 252. Lord Ellenborough suggested (3 M. & Sel. 407) that although repairing a donor's own tomb was not a charitable purpose, it was otherwise where the tomb was for his family. But the statute had been complied with, and the later cases admit no such distinction. These cases also show that a trust for the perpetual repair of a tomb, not being charitable, is void as a perpetuity.

(*a*) *Ante*, p. 200; *Willis* v. *Brown*, 2 Jur. 987, is not clearly reported. As to gifts upon the condition of keeping a tomb, etc., in repair, see *post*, pp. 250, 251.

(*b*) *Re Hewitt*, 49 L. T. 587; *Langham* v. *Peterson*, 87 L. T. 744; *Re Barnett*, 24 T. L. R. 788 (anniversary dinner).

(*c*) *James* v. *Allen*, 3 Mer. 17; *Re Jarman's Estate*, 8 Ch. D. 584; *Re Barnett*, 24 T. L. R. 788.

(*d*) *Morice* v. *Bishop of Durham*, 9 Ves. 399, 10 Ves. 532; *contra* by the law of Scotland, *Millar* v. *Rowan*, 5 Cl. & Fin. 99.

(*e*) *Kendall* v. *Granger*, 5 Bea. 300; *Langham* v. *Peterson*, 87 L. T. 744.

(*f*) *Heath* v. *Chapman*, 2 Drew. 417. The trust was for masses "and other pious uses": and it was further held that even if the latter could, standing alone, be supported as "such pious uses as were charitable," yet they were vitiated by being connected with the direction for masses.

(*g*) *Vezey* v. *Jamson*, 1 S. & St. 69; *Blair* v. *Duncan*, [1902] A. C. 37, *post*, pp. 219, 220.

(*h*) *Re Macduff*, [1896] 2 Ch. 451, where *Browne* v. *Yeale*, 7 Ves. 50, n. is discussed. *Re How*, [1929] W. N. 178.

(*i*) *Att.-Gen.* v. *National Provincial & Union Bank of England*, [1924] A. C. 262.

(*k*) *Re Sidney*, [1908] 1 Ch. 126.

(*l*) *Re Nottage*, [1895] 2 Ch. 649; *Re Swain*, 99 L. T. 604; *Re Patten*, [1929] 2 Ch. 276.

(*m*) *Re Drummond*, [1914] 2 Ch. 91.

(*n*) *Miley* v. *Att.-Gen.*, [1910] 1 Ir. 455.

(*o*) *Re Porter*, [1925] Ch. 746.

(*p*) *Re Hummeltenberg*, [1923] 1 Ch. 237.

(*q*) *Re Da Costa*, [1912] 1 Ch. 337.

(*r*) *Re Clifford*, 106 L. T. 14.

(*s*) *Re Meech's Will*, [1910] 1 Ch. 426.

(*t*) *Re Pleasants*, 39 T. L. R. 675. (*u*) *Re Davies*, [1915] 1 Ch. 543.

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chartered companies of the City of London to increase their stock of corn, which they are (or were) compelled to keep for the London market, is not charitable, since it is in effect a gift to the company absolutely (*x*).

Context showing charitable intention.

There are, however, numerous cases in which gifts expressed in general or vague terms have been held on the context to be confined to purposes which are charitable (*y*).

Bequests for private institutions not charitable.

In *Ommanney* v. *Butcher* (*z*) the testatrix declared as to certain money that she wished it to be given in private charity. Sir T. Plumer, M.R., held that the words did not create a trust which could be carried into effect. Assisting individuals in distress was private charity; but such a purpose could not be executed by the Court or the Crown (*a*). So a gift to found a private museum (*b*), or library (*c*), or in aid of a subscription library (*d*), or of a mechanics' institute (*e*), or a trade union (*f*), of for the benefit of persons engaged in a certain trade (*g*), or for the benefit of an orphan school kept by an individual substantially at his own expense (*h*), or for the benefit of the children of the tenants on an estate (*i*), is not charitable.

Friendly Society

Whether a gift to a friendly society is charitable or not, would seem to depend on the question whether, by the rules of the particular society, poverty is or is not a necessary element to entitle a member to the benefits of the society (*k*).

If a testator gives property for a purpose, beneficial to the public, or a section of it, but subject to a proviso that the public shall acquire no rights, no charitable trust is created (*l*).

Bequest not necessarily charitable on account of professional or official character of legatee.

Mr. Jarman lays it down, as a general principle (*m*), that "a gift will not be deemed charitable merely from the nature of the professional character of the devisee, or on account of the testator

(*x*) *Att.-Gen.* v. *Haberdashers' Company*, 1 My. & K. 420.

(*y*) See *post*, pp. 221, 222.

(*z*) T. & R. 260; and see *Nash* v. *Morley*, 5 Bea. 177; *Re Sinclair's Trust*, 13 L. R. Ir. 150.

(*a*) Lord Langdale, M.R., thought a bequest "for the relief of domestic distress, and assisting indigent but deserving individuals," a good charitable bequest: *Kendall* v. *Granger*, 5 Bea. 303.

(*b*) *Thomson* v. *Shakespear*, Johns. 612, 1 D. F. & J. 399.

(*c*) *Re Hawkins*, 22 T. L. R. 521.

(*d*) *Carne* v. *Long*, 2 D. F. & J. 75; *Re Swain*, 99 L. T. 664.

(*e*) *Re Dutton*, 4 Ex. D. 54; *Re Sheraton's Trusts*, [1884] W. N. 174.

(*f*) *Re Amos*, [1891] 3 Ch. 159.

(*g*) *Re Gassiot*, 70 L. J. Ch. 242; *Re Barnett*, 24 T. L. R. 788.

(*h*) *Clark* v. *Taylor*, 1 Drew. 642.

(*i*) *Browne* v. *King*, 17 L. R. Ir. 448; *Re Cullimore's Trusts*, 27 L. R. Ir. 18. See *Re Tunno*, [1886] W. N. 154.

(*k*) See and compare *Re Clark's Trust*, 1 Ch. D. 497; *Spiller* v. *Maude*, 32 Ch. D. 158, n.; *Pease* v. *Pattinson*, 32 Ch. D. 154; *Re Buck*, [1896] 2 Ch. 727; *Re Lacy*, [1899] 2 Ch. 149, where *Cunnack* v. *Edwards*, [1896] 2 Ch. 679 (*post*, p. 232, n. (*g*)), is referred to.

(*l*) *Re Pitt-Rivers*, [1902] 1 Ch. 403.

(*m*) First edition, p. 193. See Tudor on Charities (5th ed.), p. 9.

having accompanied the gift with an expression of his expectation that the devisee would discharge the duties incidental to such character, however intimately those duties may concern the welfare of others, as this merely denotes the motive of the gift, and not that the devisee is to take otherwise than beneficially. Thus, in *Doe* d. *Phillips* v. *Aldridge* (*n*), where the devise was to the Rev. A. A., a dissenting minister (described as preacher at the meeting-house of L.) for life, the testator adding, 'And I further expect that he will, with the help of God, after my decease, without delay, settle and forward everything in his power, to promote and carry on the work of God at L. aforesaid, both in his lifetime and after his decease'; it was contended that the devise to A. A. was void, as charitable, being not in his individual capacity, but in the character of preacher, and in confidence that he would discharge the duties of that station. But the Court held that it was not charitable, and thought the point too clear for discussion.

Trusts too indefinite to be pronounced charitable.

"It generally happens, however, that where the words of the will fail to point out charity as the object of the testator's gift, they nevertheless show that he meant the devisees or legatees to take the property as trustees, and not for their benefit. Thus in the case of *Morice* v. *Bishop of Durham* (*o*) (which is a leading case), it was decided that a bequest to the Bishop of D. to dispose of *to such objects of benevolence and liberality* as he should approve, was not charitable, and that the bishop was a trustee for the next-of-kin."

Doe v. *Copestake.*

Mr. Jarman also cites *Doe* d. *Toone* v. *Copestake* (*p*), where an estate was devised to trustees, to be applied by them and the officiating ministers of the congregation or assembly of the people called Methodists assembling at L., and as they should from time to time think fit to apply the same; it was held that the devise was not charitable, the application being left to the trustees still more indefinitely than it was in *Morice* v. *Bishop of Durham*, and it was not argued that the trust was restricted to charitable purposes merely because the Methodist ministers were appointed trustees with others (*q*).

Gift to charitable society,

But a gift to a society or institution having a charitable object is *prima facie* a gift for the purposes of the society or institution,

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(*n*) 4 T. R. 264; *Donnellan* v. *O'Neill*, Ir. R. 5 Eq. 523.

(*o*) 9 Ves. 399, 10 Ves. 532; *ante*, p. 206, and *post*, pp. 458, 459. Followed in *Re Davidson*, 99 L. T. 222.

(*p*) 6 East, 328.

(*q*) If the gift had been to the minister for the time being, or to the minister and his successors without other trustees, it would have been a good charitable gift on the principle laid down in *Thornber* v. *Wilson* and other cases cited *post*, note (*u*).

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and is therefore a good charitable gift (*r*). Thus a gift to a religious institution or society is a charitable gift, unless it appears in the particular case that the institution or society is not charitable, in which case the gift is only good if it is intended for the benefit of the persons who are members of the institution or society at the testator's death (*s*). So a gift to the governors of a charitable institution is a good charitable gift (*t*). And a gift to the minister for the time being of a chapel, or to the minister and his successors (*u*), or to the vicar and churchwardens for the time being of a parish (*x*), is *prima facie* a good charitable gift; and none the less so because the property is to be applied in such manner as the legatees think fit (*y*). And where a testator gave a legacy to three persons by name, "A., B., and C., Nazareth House, Hammersmith, or their successors," and it appeared that A., B., and C. were at the date of the will, and at the testator's death, holders of official positions in a religious and charitable community occupying Nazareth House, it was held that the testator, by the use of the word "successors," must have meant their successors in office, and that the bequest was therefore made to them as officials of the charity (*z*).

or to "minister" or "vicar and churchwardens" for the time being.

(*r*) *Re White*, [1893] 2 Ch. 41; *Mahony* v. *Duggan*, 11 L. R. Ir. 260; *Wordie's Trustees* v. *Wordie*, [1916] S. C. 126; *Cameron's Trustees* v. *Mackenzie*, [1915] S. C. 313.

(*s*) As in *Cocks* v. *Manners*, L. R. 12 Eq. 574, where the society was for the encouragement of private devotion: *ante*, p. 210. See also *Re Delany's Estate*, 9 L. R. Ir. 227; *Morrow* v. *M'Conville*, 11 L. R. Ir. 236; *Mahony* v. *Duggan*, *ib.* 260; *Re Wilkinson's Trusts*, 19 L. R. Ir. 531; *Bradshaw* v. *Jackman*, 21 L. R. Ir. 12, cited *post*, Chap. X.; *Re Joy*, 60 L. T. 175.

(*t*) *Per* Lord St. Leonards, *Incorporated Society* v. *Richards*, 1 D. & War. 294; and *per* Lord Hatherley, *Att.-Gen.* v. *Sidney Sussex Coll.*, L. R. 4 Ch. 730; *Re Maguire*, L. R. 9 Eq. 632; *Re Lea*, 34 Ch. D. 528 (legacy to the general superintendent of the Salvation Army).

(*u*) *Grieves* v. *Case*, 4 B. C. C. 67, 2 Cox, 301, 1 Ves. jun. 548; *Thornber* v. *Wilson*, 3 Drew. 245, 4 *ibid.* 350; *Robb* v. *Bishop Dorian*, I. R. 9 C. L. 483, 11 C. L. 292; *Gibson* v. *Representative Church Body*, 9 L. R., Ir. Ch. 1. See also *Smart* v. *Prujean*, 6 Ves. 567, and *Cocks* v. *Manners*, L. R., 12 Eq. 574. In the last case the gift to the convent, though held not charitable, was still treated as a trust for the purposes of the institution; not involving a perpetuity, but capable of being performed by the existing members spending the gift as they pleased, as to which, see *Brown* v. *Dale*, 9 Ch. D. 78, and cf. *Thomson* v. *Shakespear*, John. 612; *Carne* v. *Long*, 2 De G. F. & J. 75; *Re Clark's Trust*, 1 Ch. D. 497 (which were void for perpetuity). In *Aston* v. *Wood*, L. R., 6 Eq. 419, a legacy "to the trustees of Zion Chapel, to be apportioned according to the statement appending," no such statement being forthcoming, was held to fall into the residue. The express reference to a trust to be declared appears to have rebutted any presumption in favour of the chapel. Moreover, there was the same difficulty as in *Doe* v. *Copestake*, *ante*, p. 213, namely, that the testator appointed trustees of his own, either in addition to or in substitution for the trustees of the chapel.

(*x*) *Re Garrard*, [1907] 1 Ch. 382.

(*y*) *Ibid.* The principle does not apply if the legatee is expressly authorised to apply the money for purposes not exclusively charitable: *Re Davidson*, [1909] 1 Ch. 567; *Re Harbison*, [1902] 1 Ir. R. 103, *post*, p. 873; *Re Friends' Free School*, [1909] 2 Ch. 675; *Re Bain*, 45 T. L. R. 302.

(*z*) *Re Delany*, [1902] 2 Ch. 642. Compare *Re Laffan and Downes' Contract*, [1897] 1 Ir. R. 469; *Re Brown*, [1898] 1 Ir. R. 423, and *Re Barclay*, [1929] 2 Ch. 173.

But where a testator made a bequest to the C. O. S., a charitable society, upon trust to apply one-tenth of the income for the purposes of the society, and to pay the residue to such other society or societies as in the opinion of the governing body of the C. O. S. should be most in need of help, it was held that no general charitable intention could be inferred from the terms of the gift, because the "other society or societies" were not necessarily charitable. The gift, therefore, failed as to nine-tenths of the bequest (*a*).

Charitable object not implied.

If money is bequeathed to a municipal corporation upon trusts or for purposes which the testator does not specify, it will not be assumed that they were meant to be charitable (*b*).

Uncertainty in the object.

IV.—Uncertainty.—A charitable gift may fail by lapse or because the purpose which the testator had in mind has become impossible (*c*), or because the subject-matter of the gift is uncertain (*d*), but a charitable gift is never void for uncertainty in the object (*e*). Consequently a gift for charitable purposes is good, even if the testator leaves the selection of the specific purposes to his executor or some other person (*f*), or has left a blank in his will for the name or description of the specific charitable institution or purpose to which he intends it to be devoted (*g*), or has otherwise failed to indicate definitely the exact way in which he wishes the money to be applied (*h*).

(*a*) *Re Freeman*, [1908] 1 Ch. 720.

(*b*) *Corporation of Gloucester* v. *Wood*, 3 Ha. 131; *S. C.*, s. n. *Corporation of Gloucester* v. *Osborn*, 1 H. L. C. 272, stated *post*, p. 457. See also *Re Rowe*, 30 T. L. R. 528.

(*c*) *Post*, p. 228.

(*d*) *Post*, p. 433. See and consider *Macduff* v. *Spence's Trustees*, [1909] S. C. 178. Discussed in Tudor on Charities (5th ed.), p. 59.

(*e*) This of course assumes that the object is a charity. But a gift may be void for uncertainty if it is expressed in such general language that it includes objects which are not charitable: *post*, p. 219.

(*f*) As in *Whicker* v. *Hume*, 14 Bea. 509; *Lewis* v. *Allenby*, L. R., 10 Eq. 668; *Dick* v. *Audsley*, [1908] A. C. 347 (where the powers given to the trustees were of the widest possible description). See also *White* v. *White*, *Moggridge* v. *Thackwell*, *Mills* v. *Farmer*, *Att.-Gen.* v. *Boultbee*; *Re Willis*, [1921] 1 Ch. 44; *Re Cammell*, 69 Sol. J. 345; and other cases cited *post*, p. 224.

(*g*) *Pieschel* v. *Paris*, 2 S. & St. 384, *post*, p. 225; *Re White*, [1893] 2 Ch. 41; *Re Macduff*, [1896] 2 Ch. 451. The decision in *Aston* v. *Wood*, L. R. 6 Eq. 419, proceeded on the principle laid down in *Corporation of Gloucester* v. *Wood*, 3 Ha. 131 (*S. C.*, *Corporation of Gloucester* v. *Osborn*, 1 H. L. C. 272) namely that a charitable intention cannot be presumed from the mere gift of money to a public or quasi-public body.

(*h*) *Att.-Gen.* v. *Syderfin*, 7 Ves. 43 n. (see *per* C. A., [1893] 2 Ch. 53): *Comm. Charitable Donations* v. *Sullivan*, 1 Dr. & War. 501; *Yates* v. *University College*, L. R. 7 H. L. 438; *Re Huxtable*, [1902] 2 Ch. 793, *post*, p. 222; *Re Garrard*, [1907] 1 Ch. 382; *Gillan* v. *Gillan*, 1 L. R. Ir. 114; *Pocock* v. *Att.-Gen.*, 3 Ch. D. 342, *post*, p. 221; *Re Forester*, 13 T. L. R. 555. See *Nightingale* v. *Goulbourn*, 5 Ha. 484, 2 Phil. 594, where the gift was to "the Chancellor of the Exchequer for the time being, and to be by him appropriated to the benefit and advantage of my beloved country Great Britain": held a good charitable bequest. See *ante*, p. 202.

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Nor is a charitable bequest void for uncertainty merely because the body of persons for whose benefit it is given is large and fluctuating (*i*), or because it gives the testator's trustees a wide power of selection (*k*). So if a testator bequeaths a legacy to a charitable institution which has never existed, this is *prima facie* a good charitable bequest (*l*). And if a testator bequeaths a legacy to a charity by a name or description which is common to two or more institutions, and it cannot be ascertained which was the intended object, the legacy will be divided between them, or administered *cy-près* in some other manner (*m*). But where a testator bequeathed to each of the inmates for the time being of "the several hospitals of or in the vicinity of Canterbury" a certain yearly sum, it was held that the bequest was void for uncertainty, principally on the ground that the amount of the fund to be appropriated to answer the bequest could not be determined (*n*).

Uncertainty in the amount.

Alternative gift.

Where the gift is incompletely expressed (as "to the P. A. Society or some one or more kindred institutions") the Court will settle a scheme for its application (*o*).

Where trustees have discretion.

If, however, the executors or trustees of a will have an absolute discretion of selecting the charitable objects and purposes to which the testator's property is to be applied, the Court will not, it seems, in the absence of special circumstances, require a scheme, but will leave the application of the property to the trustees (*p*).

Inference of charitable intention.

It will be remembered that where a testator makes a bequest to a charitable society, and gives it a power of application sufficiently wide to cover non-charitable objects, the Court will not infer a general charitable intention from the mere fact that the society is a charitable one (*q*).

Ambiguous description.

If a testator gives a legacy to a charity by a particular name

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(*i*) *Re Brown*, [1898] 1 Ir. R. 423.

(*k*) As in *Weir* v. *Crum-Brown*, [1908] A. C. 162, where the trustees were to make a scheme for the relief of indigent bachelors and widowers "who have shown practical sympathy either as amateurs or professionals in the pursuits of science in any of its branches, whose lives have been characterised by sobriety, morality and industry, and who are not less than fifty-five years of age": *Re Williams*, [1927] 2 Ch. 283 (power to vary objects).

(*l*) *Post*, p. 232; *Re Davis*, [1902] 1 Ch. 876; *Re Parkes*, 25 T. L. R. 523.

(*m*) *Waller* v. *Childs*, Amb. 524; *Bennett* v. *Hayter*, 2 Bea. 81; *Simon* v. *Barber*, 5 Russ. 112; *Re Clergy Society*, 2 K. & J. 615; *Re Kilvert's Trusts*, L. R. 7 Ch. 170; *Re Alchin's Trusts*, L. R. 14 Eq. 230; *Re Barnard*, 7 T. L. R. 73; *Re Hill*, 53 Sol. J. 228.

(*n*) *Flint* v. *Warren*, 15 Sim. 626.

(*o*) *Re Delmar Charitable Trust*, [1897] 2 Ch. 163. As to schemes, see *post*, pp. 224, 235.

(*p*) *Re Delmar C. T.*, *supra*; *Warren* v. *Clancy*, [1898] 1 Ir. R. 127; *Re Pardoe*, [1906] 2 Ch. 184; *Armitage* v. *Gordon*, 15 T. L. R. 453; *Re Squire's Trust*, 17 T. L. R. 724.

(*q*) *Re Freeman*, [1908] 1 Ch. 720, and other cases cited, *post*, p. 220.

Parol evidence.

or description, and it is found that there is no institution exactly answering the description, and that there are two or more institutions to which the description partially applies, parol evidence is admissible to show the locality and nature of the rival institutions, and the connection between the testator and one or both of them (*r*); for example, it may be proved that the testator during his life subscribed to one of the institutions (*s*).

Gifts to two institutions.

In *Lee* v. *Pain* (*t*), the testatrix by a codicil bequeathed a legacy of £100 to "Highbury College" and £500 to "the Hoxton Academy." There had formerly been an institution called the Hoxton Academy, but ten years before the date of the codicil it had been removed to Highbury, and was thenceforward called Highbury College; consequently if the testatrix had simply bequeathed £500 to the Hoxton Academy the Court would probably have held Highbury College entitled to it, but such a construction was excluded by the bequest of £100 to Highbury College. It is true that the principle of this decision was disregarded in *Re Maguire* (*u*), where a testatrix bequeathed a legacy of £200 to the I. A. C. S. and £200 to the I. C. P. S., both charitable institutions; at the date of the will there was an I. A. C. S., but shortly before the testatrix's death it changed its name to the I. S. A. S.; there had never been any such society as the I. C. P. S., but the I. S. A. S. had objects similar to those which would have been carried out by the I. C. P. S. if it had existed for the purposes indicated by the name; it was held that the I. S. A. S. was entitled to both legacies, but the Attorney-General did not object, and the point decided in *Lee* v. *Pain* does not seem to have been argued.

Re Maguire.

Where two societies unite.

In *Re Joy* (*x*), the testatrix bequeathed a legacy of £200 each to two societies which amalgamated after the date of the will: it was held that the united society was entitled to £400.

If a testator bequeaths a fund for two definite purposes, one

(*r*) The cases of *Bradshaw* v. *Thompson*, 2 Y. & C. C. C. 295; *Wilson* v. *Squire*, 1 Y. & C. C. C. 654; *Smith* v. *Ruger*, 5 Jur. (N.S.) 905; *Re Davies' Trusts*, 21 W. R. 154, are referred to in Chap. XXXV. The following cases also illustrate the same principle: *Buxton* v. *Blakiston*, 2 T. L. R. 293; *Re Bradley*, 3 T. L. R. 668; *Re Beale*, 6 T. L. R. 308; *Re Mussard*, 7 T. L. R. 742; *Re Doane*, 9 T. L. R. 2; *Re Johnson*, 9 T. L. R. 277; *Re Barker*, 11 T. L. R. 82; *Re Lucett*, 13 T. L. R. 373.

(*s*) *Re Fearn's Will*, 27 W. R. 392; *Re Kilvert's Trusts*, L. R. 7 Ch. 170; *British Home for Incurables* v. *Royal Hospital for Incurables*, 90 L. T. 601; *Makeown* v. *Ardagh*, Ir. R., 10 Eq. 445. Other kinds of evidence are referred to in *Re Clergy Society*, 2 K. & J. 615, *post*, p. 233. See *Re Morgan*, 25 T. L. R. 303, where the society was identified by the name of its secretary. *Re Bateman*, 27 T. L. R. 313, where the evidence was inadmissible.

(*t*) 4 Ha. 254. See *Re Pritt*, 113 L. T. 136.

(*u*) L. R., 9 Eq. 632.

(*x*) 60 L. T. 175. See *Re Adams*, 4 T. L. R. 757; *Re Faraker*, [1912] 2 Ch. 488 (consolidated charities).

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Gift partly good and partly bad.

of which is illegal and the other charitable, the question arises how far the latter purpose can be carried into effect. According to some of the authorities, it seems that if the illegal purpose is the primary purpose, the surplus only being given to charity, and the primary purpose is of such a nature that the amount required to carry it out cannot be ascertained, the result is that the surplus cannot be ascertained and the whole gift fails (*y*). But if the primary purpose is of such a definite nature that the testator must have intended the charity to take a substantial sum by way of surplus, then the effect of the failure of the primary purpose is that the charity takes the whole. A common instance of this kind of gift is where a testator gives a fund upon trust to apply the income in the first place in maintaining a tomb, and to apply the surplus to some charitable purpose (*z*). In *Hoare* v. *Osborne* (*a*), there were three primary objects, one of which was illegal, and it was held that one-third of the fund fell into the residue, and that the charity to which the surplus was given took the income arising from the other two-thirds after satisfying the two legal primary purposes.

Hoare v. *Osborne.*

If, however, the testator has given a fund for two purposes *pari passu*, one of them being illegal and the other charitable, the Court will endeavour to ascertain what portion of the fund would be sufficient to satisfy the illegal purpose if it were legal; this part of the gift fails, and the charity only takes the balance of the fund (*b*). If it is impossible to make the calculation, the Court will divide the fund between the two purposes (*c*).

All indefinite trusts void unless for charity.

The Court does not take upon itself to frame schemes for the disposal of money for any other than charitable purposes. All moneys, therefore, not bequeathed in charity must have some definite object, or must devolve as undisposed of (*d*), except in

(*y*) *Chapman* v. *Brown*, 6 Ves. 404, stated below, p. 442; *Cramp* v. *Playfoot*, 4 K. & J. 479. In *Fisk* v. *Att.-Gen.* (L. R., 4 Eq. 521), Wood, V.-C., thought that the authority of *Chapman* v. *Brown* had been restricted by the decision of the House of Lords in *Magistrates of Dundee* v. *Morris* (3 Macq. 134). But in *Re Birkett* (9 Ch. D. 576), Jessel, M.R., thought that *Chapman* v. *Brown* was not affected.

(*z*) *Re Rogerson*, [1901] 1 Ch. 715; following *Fisk* v. *Att.-Gen.*, L. R., 4 Eq. 521; *Dawson* v. *Small*, L. R., 18 Eq. 114; and *Re Birkett*, 9 Ch. D. 576. *Fowler* v. *Fowler*, 33 Bea. 616, and *Kirkmann* v. *Lewis*, 38 L. J. Ch. 570, appear to be overruled; but the state of the authorities is far from satisfactory. See Tudor on Charities (5th ed.), pp. 60 *et seq.*

(*a*) L. R., 1 Eq. 585.

(*b*) *Re Vaughan*, 33 Ch. D. 187.

(*c*) *Hoare* v. *Osborne*, L. R., 1 Eq. 585; *Re Rigley's Trust*, 36 L. J. Ch. 147.

(*d*) *Morice* v. *Bishop of Durham*, 9 Ves. 399, 10 *ibid.* 522; *James* v. *Allen*, 3 Mer. 17; *MacLaughlin* v. *Campbell*, [1906] 1 Ir. R. 588; *Bowman* v. *Secular Society, Ltd.*, [1917] A. C. 406, 441 (*per* Lord Parker). See *Ommanney* v. *Butcher*, *ante*, p. 212. This question is further referred to *post*, p. 876.

cases where it may be held that the trustee takes absolutely. The general consideration of such gifts will be reserved for a subsequent chapter, as more properly falling under the head of gifts void for uncertainty; but it must be here noticed, that where the bequest is for charitable purposes, and also for purposes of an indefinite nature not charitable, and no apportionment of the bequest is made by the will, so that the whole might be applied for either purpose, the whole bequest is void (*e*). A distinction not now recognised was indeed formerly taken, that such a bequest was good, if there were trustees named, to whose discretion the testator had committed the carrying out of his intentions, and with whom, therefore, the Court would not interfere (*f*). Such a distinction will be found inconsistent with the decisions presently noticed; and it seems now established, that the Court will only recognise the validity of trusts which it can either itself execute, or can control when in process of being executed by trustees (*g*).

Bequests for charitable and other indefinite purposes void altogether.

Vezey v. *Jamson.*

Thus, in *Vezey* v. *Jamson* (*h*), where a testator gave the residue of his estate to his executors, upon trust to apply and dispose of the same in or towards such charitable uses or purposes, person or persons, or otherwise, as he might by any codicil, or by memorandum in his own handwriting, appoint, and as the laws of the land would admit of; and, in default, upon trust to pay and apply the same in or towards such charitable or public purposes, as the laws of the land would admit of; or to any person or persons, and in such shares, manner, and form as his (the testator's) executors, or the survivor of them, or the executors or administrators of such survivor, should in their or his discretion, will, and pleasure, think fit, or as they should think would have been agreeable to him, if living, and as the laws of the land did not prohibit: Sir J. Leach, V.-C., observed, that the testator had not fixed upon any part of the property a trust for a charitable use, and the Court could not, therefore, devote any part of it to charity; he had given it to the trustees expressly upon trust, and they could not, therefore, hold it for their own benefit; the purposes of the trust being so general and undefined, they must fail altogether, and the next-of-kin become entitled.

(*e*) *Re Macduff*, [1896] 2 Ch. 451; *Blair* v. *Duncan*, [1902] A. C. 37; *Re Sidney*, [1908] 1 Ch. 126, 488. See *Langham* v. *Peterson*, 87 L. T. 744, *post*, n. (*i*); *Re Ogden*, 25 T. L. R. 382.

(*f*) *Waldo* v. *Caley*, 16 Ves. 206; *Horde* v. *Earl of Suffolk*, 2 My. & K. 59; the latter case, though decided after *Vezey* v. *Jamson*, did not notice it; and see the observations of Cottenham, C., 1 My. & Cr. 293.

(*g*) *Nash* v. *Morley*, 5 Bea. 182; *Blair* v. *Duncan*, [1902] A. C. 37.

(*h*) 1 S. & St. 69; *Re Chapman*, [1922] 2 Ch. 479 (distinguishing *Re Howell*, [1915] 1 Ch. 241).

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And in *Kendall* v. *Granger* (*i*), where the trustees were directed to dispose of the residue for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility in such mode and proportions as their own discretion might suggest, irresponsible to any person or persons whatsoever; Lord Langdale, M.R., decided that the gift was void for uncertainty. He said that to make the bequest valid, it must be obligatory on the trustees to apply the whole (*k*) of it in charity; it was not a question whether the trustees might apply the fund to a charitable purpose, but whether by the words of the will they were bound to do so. To make the bequest valid it must be obligatory on them.

Hunter v. *Att.-Gen.*

The principle laid down in the foregoing cases was the subject of much difference of judicial opinion in the case of *Hunter* v. *Att.-Gen.* (*l*). The House of Lords finally decided that the terms of the gift, if it had been valid, would have authorised the trustees to expend the whole fund for a purpose not charitable (namely, the purchase of advowsons), and that consequently there was no general trust for charity and the whole gift failed.

Lord Davey's classification.

In that case (*m*) Lord Davey distinguished three classes of cases: First, where charitable purposes are mixed up with other purposes of such a shadowy and indistinct nature that the Court cannot execute them (such as "charitable or benevolent" or "charitable or philanthropic" or "charitable or pious purposes"), or where the description includes purposes which may or may not be charitable (such as "undertakings of public utility") and a discretion is vested in the trustees. In these cases the gift fails for uncertainty. Instances of this class are "charitable or public" (*n*), "hospitality or charity" (*o*), "charitable or other purposes" (*p*), "charitable purposes or encouraging undertakings of general utility" (*q*), "charitable or

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(*i*) 5 Bea. 303. See also *Thompson* v. *Thompson*, 1 Coll. 392; *Williams* v. *Kershaw*, 5 Cl. & Fin. 111 ("benevolent, charitable, and religious purposes"); *Grimond* v. *Grimond*, [1905] A. C. 124 ("charitable or religious institutions or societies"); *Re Pardoe*, [1906] 2 Ch. 184 ("public charities and institutions"); *Re Freeman*, [1908] 1 Ch. 720 ("other societies"); *Re Davidson*, 99 L. T. 222 ("other societies," etc.); *Boyle* v. *Boyle*, Ir. R. 11 Eq. 433; *Shaw's Trustees* v. *Esson's Trustees*, 8 F. 52; *Thomson* v. *Shakespear*, John. 612, 1 D. F. & J. 399; *Re Jarman's Estate*, 8 Ch. D. 584.

(*k*) See *James* v. *Allen*, 3 Mer. 17; *Re Jarman's Estate*, *supra*.

(*l*) [1899] A. C. 309, reversing the decision of C. A. in *Re Hunter*, [1897] 2 Ch. 105, and restoring that of Romer, J., [1897] 1 Ch. 518. Followed in *Re Davidson*, [1909] 1 Ch. 567.

(*m*) [1899] A. C., at p. 323.

(*n*) *Vezey* v. *Jameson*, 1 Sim. & Stu. 69; *Blair* v. *Duncan*, [1902] A. C. 37; *Re Davis*, [1923] 1 Ch. 225.

(*o*) *Re Hewitt*, 49 L. T. 587.

(*p*) *Ellis* v. *Selby*, 1 My. & Cr. 286.

(*q*) *Kendall* v. *Granger*, 5 Bea. 300.

benevolent" (*r*), "sick poor or any other utilitarian purposes" (*s*), "charitable or emigration uses" (*t*), "civil or religious purposes" (*u*), for establishing a monastery or any other religious, ecclesiastical or charitable institution (*x*), "such charitable institutions and deserving agencies in A. & S. as his trustees might select" (*y*), for such objects or purposes as her executor might select (*z*), "wholly or part for the good of religion" (*a*), "charity or works of public utility" (*b*). Sometimes by the use of the *ejusdem generis* doctrine (*c*), or by construing "or" in a non-disjunctive sense (*d*), the gift is good. On the other hand, the word "and" is sometimes read disjunctively and the gift fails for uncertainty (*e*). The principles on which this is done are explained by Sargant, J., in *Re Eades* (*e*).

Such being the rule, the terms of the trust will first be closely examined to see whether, though not the most correct or most appropriate for describing only a charitable object, they ought not in fair construction to be so confined.

Pocock v. *Att.-Gen.*

In *Pocock* v. *Att.-Gen.* (*f*), where a testator, after giving several charitable legacies out of a particular fund, directed the residue of it "to be given by his executors to such charitable institutions as he should by any future codicil give the same, and in default of any such gift, then to be distributed by his executors at their discretion"; the testator made no further codicil, and it was held that the direction in favour of charity ran through the whole sentence: that the testator intended to choose the charitable institutions himself, but that if he failed to do so his executors were to choose them.

Charity held the sole purpose, notwithstanding doubtful expression.

On the same principle, a bequest of a sum to "be given in charitable and deserving objects," or "for charitable and

(*r*) *Re Jarman's Estate*, 8 Ch. D. 584. See the Scottish case of *Jackson's Trustees* v. *Lord Advocate* [1926] S. C. 579; *Re Riland's Estate*, [1881] W. N. 173.

(*s*) *Re Woodgate*, 30 Sol. J. 517.

(*t*) *Re Sidney*, [1908] 1 Ch. 126, 488.

(*u*) *Re Friends' Free School*, [1909] 2 Ch. 675.

(*x*) *Commissioner of Charities* v. *McCartan*, [1917] 1 Ir. R. 388.

(*y*) *Symmers Trustees* v. *Symmers*, [1918] S. C. 33; *Campbell's Trustees* v. *Campbell*, [1921] S. C. 12.

(*z*) *Re Chapman*, [1922] 2 Ch. 479.

(*a*) *Dunne* v. *Byrne*, [1912] A. C. 407.

(*b*) *Langham* v. *Petersen*, 87 L. T. 744.

(*c*) *Campbell's Trustees* v. *Campbell*, [1920] S. C. 297 (charitable or other deserving institutions); *Re Ludlow*, 129 L. T. 247.

(*d*) *Re Bennett*, [1920] 1 Ch. 305 (charitable institutions or other public objects).

(*e*) [1920] 2 Ch. 353 (religious, charitable and philanthropic objects); *Att.-Gen. for New Zealand* v. *Brown*, [1917] A. C. 393 (charitable, benevolent, religious and educational institutions, societies, associations, and objects); *Edgar's Trustees* v. *Cassells*, [1922] S. C. 385 seems inconsistent with *Houston* v. *Burns*, [1918] A. C. 337.

(*f*) 3 Ch. D. 342. Cf. *Wheeler* v. *Sheer*, Mos. 288, cited 1 Mer. 91, 97; *Re Pardoe*, [1906] 2 Ch. 184.

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benevolent institutions" (*g*), or "for religious and benevolent societies or objects," is a good charitable gift (*h*). And a gift "for such missionary objects as M. shall select," if M. is known to the testator to be engaged in a legally charitable kind of missionary work, is not void for uncertainty (*k*).

And if a testator makes a bequest to A. "for the charitable purposes agreed on between us," evidence is admissible to show what those purposes were (*l*).

Lord Davey's second class.

Lord Davey's (*m*) second class of cases is where the trustees have a discretion to apportion between charitable objects and definite and ascertainable objects not charitable. The trust does not fail, but in default of apportionment by the trustees the Court will divide the fund between the objects charitable and non-charitable equally. Instances of this class are *Att.-Gen.* v. *Doyley* (*n*) and *Salusbury* v. *Denton* (*o*). His third class are cases in which there is a general overriding trust for charitable purposes, but some of the particular purposes to which the fund may be applied are not strictly charitable, or one of two alternative modes of application is invalid in law. In such cases the trust is good, but the trustees may not apply the fund to the objectionable purposes. Instances are *Sinnett* v. *Herbert* (*p*) and *Re Douglas* (*q*).

Third class.

In *Adnam* v. *Cole* (*r*), where a testator bequeathed the residue of his personal estate (consisting partly of leasehold property) to trustees upon trust to lay out the same in building

(*g*) *Caldwell* v. *Caldwell*, 91 L. J. P. C. 95.

(*h*) *Re Sutton*, 28 Ch. D. 464; *Re Lloyd*, 10 T. L. R. 66; *Re Best*, [1904] 2 Ch. 354; *Hay's Trustees* v. *Baillie*, [1908] S. C. 1224; *Peterson's Trustees* v. *Peterson*, [1909] S. C. 485 (charities or benevolent or beneficent institutions); *Jemmit* v. *Verril*, Amb. 585, n., is therefore good law notwithstanding Lord Cottenham's disapproval of it in *Ellis* v. *Selby*, 1 My. & Cr. 292. See also *Wilkinson* v. *Lindgren*, L. R. 5 Ch. 570, where the gift was to certain specified charitable institutions "or to any other religious institutions or purposes" as the trustees might think proper; and it was held that the word "religious" must be carried on so as to apply to the "purposes," and that the gift was good. So a gift for charities, societies, and institutions "to be selected by A," was held, on the context, to mean charitable societies and institutions: *Re Douglas*, 35 Ch. D. 742. See also *Arnott* v. *Arnott*, [1906] 1 Ir. R. 127, *ante*, p. 203. But in *Re The Friends' Free School*, [1909] 2 Ch. 675, a trust for civil or religious purposes as the subscribers or members of the Society of Friends should appoint was held bad.

(*k*) *Re Kenny*, 97 L. T. 130; *Re Rees*, [1920] 2 Ch. 59. See also *Dunne* v. *Duignan*, [1908] 1 Ir. R. 228 (foreign missions).

(*l*) *Re Huxtable*, [1902] 2 Ch. 793.

(*m*) *Hunter* v. *Att.-Gen.*, [1899] A. C., at p. 325.

(*n*) 7 Ves. 58 n.

(*o*) 3 K. & J. 529.

(*p*) L. R. 7 Ch. 232.

(*q*) 35 Ch. D. 472.

(*r*) 6 Bea. 363. The trust for building the organ gallery failed under 9 Geo. 2. c. 36, so far as it depended on the leaseholds. See *Crafton* v. *Frith*, 20 L. J. Ch. 198.

such a monument to his memory as they should think fit, and in building an organ gallery in the parish church, it was held by Lord Langdale, M.R., that the trustees had not rightly exercised their discretion in applying the whole to the monument, and he referred it to the Master to ascertain in what proportion the residue ought to be divided between the two objects. In this case, it will be observed, the specific nature of the objects enabled the Court to apportion the fund between them without resorting to the expedient of cutting the knot by equal division (*s*).

And if, instead of a trust for a charitable *and* another definite object, there be a trust for a charitable *or* another definite object, as trustees shall appoint, there would be an implied trust for both in default of appointment (*t*).

Re Clarke.

The principles upon which the validity or invalidity of gifts to definite and indefinite charitable and non-charitable objects were considered and stated by Romer, J., in *Re Clarke* (*u*). In that case the testator gave his residuary estate to (a) indefinite charitable objects, (b) and (c) two named charities, and (d) such indefinite charitable and non-charitable objects as his executors should think fit, and directed that the residue should be divided amongst (a), (b), (c) and (d) in such shares and proportions as his executors should determine. *Held* (1) that the whole gift was not void for uncertainty, but that the gift to class (d) alone was void; (2) that until the executors exercised their powers of distribution the fund vested in the four classes, the objects of the power, in equal shares; (3) that as the power could be exercised by appointing the whole fund to class (b) it was invalid, just as a gift to charitable and non-charitable indefinite objects is invalid; and consequently (4) that each of the classes (a), (b), and (c) took one fourth in default, and the remaining fourth, invalidly given to class (d), went to the next-of-kin.

It may here be mentioned that the decision of a majority of the trustees of a charity binds the minority (*x*).

Registration.

Under the Charitable Donations Registration Act, 1812 (52 Geo. 3, c. 102), memorials of charitable gifts by will should be registered with the county council (section 3 (xv) of the Local

(*s*) In like manner, if there are several charitable objects, and the share of each is undefined, the Court will direct inquiries to ascertain the proportion due to each; *Re Rigley's Trust*, 36 L. J. Ch. 147; *Champney* v. *Davy*, 11 Ch. D. 949; compare *Hoare* v. *Osborne*, L. R. 1 Eq. 585, *ante*, p. 218.

(*t*) *Brown* v. *Higgs*, 4 Ves. 708, 5 Ves. 495, 8 Ves. 561; *Fordyce* v. *Bridges*, 2 Ph. 497. But see *Thompson* v. *Thompson*, 1 Coll. 399, 8 Jur. 839.

(*u*) [1923] 2 Ch. 407. In the judgment, *Down* v. *Worrall*, 1 My. & K. 561 (which is generally considered to be incorrect), is discussed. See also *Re Piercy*, [1898] 1 Ch. 565 (Georgian Mortmain Act).

(*x*) *Re Whiteley*, [1910] 1 Ch. 600.

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Government Act, 1888. The exceptions contained in sections 10, 11, 12 and 13 of the Act (see Tudor on Charities (5th ed.), pp. 277 *et seq.*) are, however, so numerous that there is a tendency to overlook the Act.

Gifts of personalty to charity are favoured.

V.—Doctrine of Cy-près—Failure—Lapse.—Except so far as, before 1892, the law restrained the dedication to charity of leaseholds and money charged on or arising out of land, as explained in a subsequent part of this chapter, "a man may dispose of his whole personal estate (*y*) to charitable purposes capable of enduring for ever, in despite of the claims of his nearest kindred; and dispositions so made are strongly favoured in point of construction (*z*); for by a rule peculiar to gifts of this nature, if the donor declare his intention in favour of charity indefinitely, without any specification of objects, or in favour of defined objects which happen to fail, from whatever cause; although in such cases, the particular mode of application contemplated by the testator is uncertain or impracticable, yet the general purpose being charity, such purpose will, notwithstanding the indefiniteness or failure of its immediate objects, be carried into effect" (*a*). Thus, in the case of a gift to the poor in general (*b*), or to charitable uses generally (*c*), or for the advancement of religion, expressed in the most vague and indefinite terms (*d*); or to such charitable uses as the testator's executor shall appoint, and the testator revokes the appointment of the executor (*e*); or the executor renounces probate (in which case he cannot claim to exercise his discretion) (*f*); or to such charitable uses as A shall appoint, and A dies in the lifetime of the testator (*g*), or neglects or refuses to appoint (*h*); or to

Such bequests executed *cy-près*, when.

(*y*) Since the passing of the Mortmain and Charitable Uses Act, 1891, impure personalty can be given to charity, and a testator can also devote his real estate to charity, subject to the necessity of its being sold within a certain time: see *post*, p. 243.

(*z*) *Cary* v. *Abbot*, 7 Ves. 490; *Anon.* Freem. Ch. Ca. 262; *Baylis* v. *Att.-Gen.*, 2 Atk. 239; *Da Costa* v. *De Pas*, Amb. 228, cit. 7 Ves. 76; *Johnston* v. *Swann*, 3 Mad. 457.

(*a*) First edition of this work, p. 216; Mr. Jarman's statement of the law must be qualified, so far as gifts in favour of defined objects are concerned, by the decisions in *Fisk* v. *Att.-Gen.*, and other cases; see *Re Ovey*, 29 Ch. D. 560.

(*b*) *Att.-Gen.* v. *Matthews*, 2 Lev. 167; *S. C. Att.-Gen.* v. *Peacock*, Finch, 245; *Att.-Gen.* v. *Rance*, cit. Amb. 422.

(*c*) *Clifford* v. *Francis*, Freem. Ch. Ca. 330; *Att.-Gen.* v. *Herrick*. Amb. 712.

(*d*) *Powerscourt* v. *Powerscourt*, 1 Mol. 616; and cases cited *ante*, p. 203.

(*e*) *White* v. *White*, 1 Br. C. C. 12.

(*f*) *Att.-Gen.* v. *Fletcher*, 5 L. J. (N.S.) Ch. 75.

(*g*) *Moggridge* v. *Thackwell*, 1 Ves. jun. 464, 3 Br. C. C. 517, 7 Ves. 36, 13 Ves. 416. In this case, and in *Mills* v. *Farmer*, 1 Mer. 55, Lord Eldon went very fully into the general doctrine; *Re Willis*, [1921] 1 Ch. 44. The decision of Romilly, M.R., *contra*, in *Chamberlayne* v. *Brockett*, 41 L. J. Ch. 789, is erroneous.

(*h*) *Att.-Gen.* v. *Boultbee*, 2 Ves. jun. 380, 3 Ves. 220.

such charitable uses as the testator himself shall appoint or has appointed, and he dies without making an appointment (*i*), or the instrument of appointment cannot be found (*k*); or where the testator makes a disposition in favour of an object which has no existence (*l*); or for a purpose which has become impossible (*m*), or unnecessary (*n*); or cannot legally be carried out in the manner directed by the testator (*o*); or bequeaths to the trustees of a charity who refuse to accept (*p*); or to a particular charity by a description equally applicable to more than one (and it is wholly uncertain which was intended (*q*)); or having evinced his intention to give certain property in charity, only disposes of part of it in favour of certain named charitable purposes (*r*), or leaves blanks in his will for the names of the charities and the proportion to be allotted to each (*s*), in these and all such cases, though the bequest would, upon the ordinary principles which govern the construction of testamentary dispositions, be wholly or partly void for uncertainty, yet the purpose being charity, the Crown as *parens patriae*, or the Court of Chancery, will execute it *cy-près* (*t*).

Exception in the case of a foreign charity.

Foreign charities are an exception to the general rule, for as

(*i*) Freem. Ch. Ca. 261; *Mills* v. *Farmer*, 1 Mer. 55; *Commissioners of Ch. Don.* v. *Sullivan*, 1 D. & War. 501; *Gillan* v. *Gillan*, 1 L. R. Ir. 114.

(*k*) *Att.-Gen.* v. *Syderfen*, 1 Vern. 224, 7 Ves. 43, n.

(*l*) *Att.-Gen.* v. *City of London*, 3 B. C. C. 171; *Loscombe* v. *Wintringham*, 13 Bea. 87; *post*, p. 232; *Re Davis*, [1902] 1 Ch. 876; but see *Att.-Gen.* v. *Oglander*, 3 Br. C. C. 166.

(*m*) *Att.-Gen.* v. *Guise*, 2 Vern. 266; *Att.-Gen.* v. *Gibson*, 2 Bea. 317, n.; *Hayter* v. *Trego*, 5 Russ. 113; *Att.-Gen.* v. *Ironmongers' Co.*, Cr. & Ph. 208; 10 Cl. & Fin. 908; *Att.-Gen* v. *Glyn*, 12 Sim. 84; *Martin* v. *Margham*, 14 *ibid.* 230; *Incorporated Society* v. *Price*, 1 J. & Lat. 498; *Re Hyde's Trusts*, 22 W. R. 69; *Att.-Gen.* v. *Bushby*, 24 Bea. 299; *Re Villers-Wilkes*, 72 L. T. 323; *Re Mann*, [1903] 1 Ch. 232, *post*, p. 227, n. (*f*). *Re Cunningham*, [1914] 1 Ch. 427 (annuity to maintain a home). If the performance of the trust is merely postponed, any accumulations of income will be applied for the purposes of the original gift: *Forbes* v. *Forbes*, 18 Bea. 552; *Att.-Gen.* v. *Craven*, 21 Bea. 392; if it is impossible, the income is applied *cy-près*: *Att.-Gen.* v. *Bowyer*, 3 Ves. 714.

(*n*) *Re Ashton's Charity*, 27 Bea. 115; *Wilson* v. *Barnes*, 38 Ch. D. 507; *Att.-Gen.* v. *Day*, [1900] 1 Ch. 31.

(*o*) *Martin* v. *Margham*, 14 Sim. 230; *Biscoe* v. *Jackson*, 35 Ch. D. 460, referred to below, p. 227, n. (*e*); *Re Sutton*, [1901] 2 Ch. 640; *Re Mann*, [1903] 1 Ch. 232.

(*p*) *Att.-Gen.* v. *Andrew*, 3 Ves. 633; *Denyer* v. *Druce*, Taml. 32; *Reeve* v. *Att.-Gen.*, 3 Hare, 191. *Re Burley*, [1910] 1 Ch. 215 (disclaimer by legatee).

(*q*) *Simon* v. *Barber*, 5 Russ. 112; *Bennett* v. *Hayter*, 2 Bea. 81; *Re Clergy Society*, 2 K. & J. 615. As to misdescription of charitable objects, see *post*, p. 1222.

(*r*) *Arnold* v. *Att.-Gen.*, Shower Parl. Ca. 22; and see the cases on the exclusion of charitable gifts from the doctrine of resulting trusts, *post*, p. 694.

(*s*) *Pieschel* v. *Paris*, 2 S. & St. 384; *Re White*, [1893] 2 Ch. 41. *Secus* of course, if the total amount applicable to charity be left in blank: *Hartshorne* v. *Nicholson*, 26 Bea. 58.

(*t*) *Lewis* v. *Allenby*, L. R. 10 Eq. 668; *Re Piercy*, 65 L. J. Ch. 364; *Re Pyne*, [1903] 1 Ch. 83.

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the Court has no jurisdiction to administer a foreign charity, it cannot execute the trust *cy-près*. Consequently if the persons who are appointed by the testator to administer the charity abroad, disclaim or refuse to accept the trusts, the gift fails (*u*)

Although there is a residuary bequest.

The rule is not displaced or superseded by a residuary bequest to other charitable uses contained in the same will. The legacy does not fall into the residue; for the doctrine is that it fails in the mode only and not in substance; and *cy-près* means the nearest to that which has so failed, not the nearest to the testator's other charitable purposes (*x*). But if the testator expressly provides that, in case the particular mode of application directed by him should fail, the legacy shall fall into the residue, it should seem that the rule is excluded (*y*). For however exceptional, it is a rule of construction, and must yield to a contrary intention (*z*).

But not if contrary intention appears by the will.

Such contrary intention may be collected by construction from the very terms of the gift; which may so clearly define the particular object of gift as to render the testator's intention incapable of execution otherwise than in the mode pointed out by the will. The mode is then of the substance, and if it cannot be pursued the legacy will fail altogether. Thus in *Att.-Gen.* v. *Bishop of Oxford* (*a*) the bequest was "to build a church at W. where the chapel now is"; the bishop (who was patron and parson) would not let it be built there, and the churchwardens suggested that "the old chapel should be repaired, the living augmented, etc.," while the next-of-kin insisted that a new church must be built and the surplus divided among them: but Lord Kenyon observed that if the bishop objected he could not interfere; that as to repairing, etc., he could not do that; the intention must be implicitly followed, or nothing could be done. So in *Corbyn* v. *French* (*b*), the legacy was to the trustees of a

Gift to particular charity.

(*u*) *New* v. *Bonaker*, L. R., 4 Eq. 655, explained in *Re Geck*, 69 L. T. 819. But if the trustees are in this country, the Court has jurisdiction to settle a scheme; *Re Vagliano*, 75 L. J. Ch. 119; *post*, p. 237; *Re Davis's Trust*, 61 L. T. 430.

(*x*) *Mayor of Lyons* v. *Adv.-Gen. of Bengal*, 1 App. Ca. 91; *Att.-Gen.* v. *Day*, [1900] 1 Ch. 31.

(*y*) See *Mayor of Lyons* v. *Adv.-Gen. of Bengal*, 1 App. Ca. 111, 115 (the Lucknow Fund); *Re Randell*, 38 Ch. D. 213. But see *Re Peel's Release*, [1921] 2 Ch. 218, *ante*, p. 197.

(*z*) See Lord Eldon's judgment, *Moggridge* v. *Thackwell*, 7 Ves. 68, a case which illustrates the length to which the doctrine has been carried.

(*a*) 1 Br. C. C. 444 n., and cited 4 Ves. 432, also 2 Ves. jun. 388, 3 Ves. 646. In *Att.-Gen* v. *Bishop of Chester*, 1 Br. C. C. 444, the legacy was retained until it could be seen whether the object which the testator had in view could be carried out. In *Re Villers-Wilkes*, 72 L. T. 323, there were some general words which seem to have prevented the total failure of the bequest. If property is given to charity in an uncertain future event, there is a resulting trust in the meanwhile: *Att.-Gen.* v. *Craven*, 21 Bea. 392. As to the Rule against Perpetuities, see *ante*, p. 197.

(*b*) 4 Ves. 431.

chapel to discharge a mortgage thereon: the mortgage had been already paid off; and Lord Alvanley held the legacy void by the statute 9 Geo. 2, c. 36, but he also held that if it had not been so, it would have been void because the object intended could not be effected, and there was no ground to apply it to any other purpose (*c*).

On the same principle, where a testator bequeathed money to maintain an almshouse on a particular piece of land, and the trust could not be carried out because the almshouse was not in mortmain, it was held that the bequest could not be administered *cy-près* (*d*).

Parker, J.'s, classification.

Parker, J., in *Re Wilson* (*e*), distinguishes the two classes of cases as follows: "First of all, we have a class of cases where in form, the gift is given for a particular charitable purpose, but it is possible, taking the will as a whole, to say that, notwithstanding the form of the gift, the paramount intention, according to the true construction of the will, is to give the property in the first instance for a general charitable purpose rather than a particular charitable purpose and to graft on to the general gift a direction as to the desires or intentions of the testator as to the manner in which the general gift is to be carried into effect. . . . Then there is the second class of cases, where, on the true construction of the will, no such paramount general intention can be inferred, and where the gift, being in form a particular gift—a gift for a particular purpose—and it being impossible to carry out that particular purpose, the whole gift is held to fail."

Where land required cannot be obtained, fund may be administered *cy-près*.

But if a testator bequeaths a sum of money to establish a charity, involving the future acquisition of land (the land to be provided from some other source), the Court will inquire whether the necessary land will be acquired within a reasonable time, and, if not, the legacy will be administered *cy-près*, provided the testator shows a general intention in favour of charity (*f*).

(*c*) *Re White's Trusts*, 33 Ch. D. 449, seems to have been decided on this principle, though the V.-C. (Bacon) said that the case was "purely and distinctly that of a lapsed legacy." A similar question arose in *Sinnett* v. *Herbert*, L. R. 7 Ch. 232, but was not decided.

(*d*) *Att.-Gen.* v. *Whitchurch*, 3 Ves. 141; *Philpott* v. *St. George's Hospital*, 6 H. L. C. 338; *Re Taylor*, 58 L. T. 538.

(*e*) [1913] 1 Ch. 314, at p. 321 (in that case the particular gift failed), *Re Packe*, [1918] 1 Ch. 437; *Burgess's Trustees* v. *Crawford*, [1912] S. C. 387. See *Clark* v. *Taylor*, 1 Drew. 642, 646; *Re Rymer*, [1895] 1 Ch. 19, at p. 31. As to *Biscoe* v. *Jackson*, 35 Ch. D. 460; see *Re Wilson*, *supra*.

(*f*) *Chamberlayne* v. *Brockett*, L. R. 8 Ch. 206. In *Re Mann* ([1903] 1 Ch. 232) a testatrix bequeathed a sum for the benefit of "M. Institute," which was a private building used for purposes beneficial to the inhabitants of the locality, but not dedicated to charity: it was held that the legacy must be administered under the direction of the Court. See also *Wallis* v. *S.-G. for New Zealand*, [1903] A. C. 173; *Re White's Trusts*, 33 Ch. D. 449;

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Lapse of time.

In *Att.-Gen.* v. *Bushby* (*g*), a testator in 1494 devised property to be applied for ever in the discharge of the tax of the commonalty of a certain town to King Henry VII and his successors; it was not known what was meant by the tax referred to, and the freemen of the town had long been in the habit of applying the income for their own benefit; in 1857 the Court directed a scheme to be prepared for the application of the income for the benefit of the town or its inhabitants generally. In this case it is clear that the property had been dedicated to charitable purposes by lapse of time, but if in a similar case the question were raised on the death of the testator, it may be that the specific purpose for which the property was given would be held to have failed.

If a testator bequeaths a fund, the income of which is to be applied in repairing a road, and the duty of repairing it is afterwards by statute imposed on a local authority, the authority is entitled to be paid the income (*h*).

Cherry v. *Mott.*

The principle laid down in *Att.-Gen.* v. *Bishop of Oxford* was followed in *Cherry* v. *Mott* (*i*), where a testator desired that, if his personal estate should be sufficient for the purpose, a presentation to Christ's Hospital should be bought for the son of a freeman of H; the personal estate proved insufficient. Sir C. Pepys, M.R., said: "This legacy is conditional. There is no gift if the personal estate be not sufficient to fulfil the contract." He added, "Another objection is that this is a gift for a particular purpose which cannot take effect by reason of the refusal of the governors, and that it therefore fails altogether." After citing *Att.-Gen.* v. *Bishop of Oxford*, and Lord Alvanley's view of the doctrine, he referred to the more extended sense in which it was understood by Lord Eldon, and concluded, "In this case, however, there is no gift except in the direction to do that which cannot be effected. It is not within the principle of those cases in which the Court executes a general purpose *cy-près*, the particular mode being impossible" (*k*).

This case has been referred to as standing on special ground as a conditional legacy. But as the condition required only that the estate should suffice for the particular mode, the appellation of "conditional" appears not to mark any difference in kind,

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Re Webster, [1912] 1 Ch. 106. In *Re Surfleet's Estate*, 105 L. T. 582, it was held that a gift in 1874 to a building fund was good because the fund had other objects than the purchase of land.

(*g*) 24 Bea. 299.

(*h*) *Att.-Gen.* v. *Day*, [1900] 1 Ch. 31; see *Re Ronald*, [1909] 2 Ch. 410,

(*i*) 1 My. & C. 123.

(*k*) *Re University of London Fund*, [1909] 2 Ch. 1, is another instance of the doctrine of *cy-près* being excluded, the legacy being conditional on a specific scheme being carried out.

but only the cogency of the terms to indicate that the mode was of the substance of the gift (*l*).

Partial exclusion of the *cy-près* doctrine.

Lord Alvanley said he thought the legacy in *Corbyn* v. *French* (supposing it not illegal), as well as the legacy in *Att.-Gen.* v. *Bishop of Oxford*, might each have been applied in repairing the particular building, though not for any other purpose (*m*). But partial exclusion of the rule is scarcely less significant than total exclusion. For the rule is that where the substantial intention is charity, but the particular mode cannot be carried into effect, the Court (or the Crown) supplies another mode (*n*): which other mode need not bear any absolute resemblance to that intended by the testator; only it must first be ascertained that none can be found nearer to it (*o*). Thus a trust for redemption of British slaves in Barbary having, after a long continuance, failed for want of objects, was executed by Lord Cottenham in favour of charity schools in England and Wales (*p*). This must be borne in mind in considering the cases that remain to be noticed.

Cy-près does not imply an absolute resemblance.

Cases of "lapse." *Clark* v. *Taylor*.

In *Clark* v. *Taylor* (*q*), a legacy was bequeathed "to the treasurer of the Female Orphan School at G, patronised by Mrs. E, for the benefit of that charity"; the school had been established and maintained by Mrs. E at her own expense, without treasurer or other official, and seems to have come to an end about the same time that the testator died (*r*). Kindersley, V.-C., said there was a recognised distinction between a gift showing a general charitable purpose, and pointing out the mode in which it was to be carried into effect, and a gift to a particular institution; that here the institution being a mere private school maintained by the beneficence of Mrs. E, he

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(*l*) As to conditional legacies to charities being void under the Rule against Perpetuities, see *Chamberlayne* v. *Brockett*, L. R. 8 Ch. 206, *post*, p. 250.

(*m*) See also *New* v. *Bonaker*, L. R., 4 Eq. 655, where a legacy to be applied for a charitable purpose in a foreign country having been refused by the government of that country, apparently on grounds of public policy, it was not argued that it should be applied *cy-près* in this country. Cf. *Att.-Gen.* v. *City of London*, 3 Br. C. C. 171.

(*n*) *Per* Lord Eldon, 7 Ves. 69. See also *per* Grant, M.R., 9 Ves. 405, And see *Pease* v. *Pattinson*, 32 Ch. D. 154 (Hartley Colliery Fund); *Biscoe* v. *Jackson*, 35 Ch. D. 460.

(*o*) *Per* Lord Cottenham, Cr. & Ph. 227. Originally the rule seems to have been wholly unqualified, for, according to Wilmot, C.J. (Opin. 32, 33), "the Court thought one kind of charity would embalm a testator's memory as well as another."

(*p*) *Att.-Gen.* v. *Ironmongers' Company*, Cr. & Ph. 208, 10 Cl. & Fin. 908. *Att.-Gen.* v. *Edalji*, 97 L. T. 292, was the case of a denominational school being closed.

(*q*) 1 Drew. 642.

(*r*) See *Re Slevin*, [1891] 2 Ch. 236; *Re Rymer*, [1895] 1 Ch. 19; *Re Cunningham*, [1914] 1 Ch. 427.

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could not say the legacy was to go to any other institution. But this decision has been questioned, and, according to the later authorities, it clearly cannot be supported unless it went on the ground that the school had come to an end before the testator's death, so that the legacy lapsed.

Russell v. *Kellett.*

In *Russell* v. *Kellett* (*s*), a legacy of fixed amount was given to each of a number of poor persons answering a certain description; some of them survived the testatrix, but died before payment, and it was held by Stuart, V.-C., that their legacies lapsed. He said the doctrine of *cy-près* meant that some other object could be found in a reasonable degree nearly answering the object mentioned by the testatrix, but that here was such a singular and particular definition of the objects as made it impossible to find any other so nearly resembling them as to justify the application of the doctrine. The will also gave the residue of the property to the legatees in proportion to their legacies and it was held that only those living at the time of distribution could take. The case was a peculiar one, and is probably not valuable as an authority on the general principle (*t*).

Marsh v. *Means.*

In *Marsh* v. *Means* (*u*), a testator gave a legacy, payable after the death of his wife, for continuing a certain publication (which had been published by the Association for Promoting Humanity to Animals) according to principles stated in one of its numbers, *viz.*, to expose cruelty to animals, to diffuse moral and religious information, etc. At the date of the will the publication had been discontinued, and the association itself was extinct; and it was held by Wood, V.-C., that this was not a bequest for promoting these principles, but for continuing the publication of this particular book, which brought the case within *Clark* v. *Taylor*, so that the doctrine of *cy-près* was not applicable, and the gift lapsed by extinction of the object.

Fisk v. *Att.-Gen.*

Again, in *Fisk* v. *Att.-Gen.* (*x*), where a legacy was given "to the Ladies' Benevolent Society at L. as part of its ordinary funds," and before the testator's death the society ceased to exist, Wood, V.-C., said it had been expressly decided by *Clark* v. *Taylor* and *Russell* v. *Kellett*, that when a gift was made by will to a charity which had expired, it was as much a lapse as a gift to an individual who had expired; and that though the

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(*s*) 3 Sm. & Gif. 264.

(*t*) See *per* Lord Herschell in *Re Rymer*, [1895] 1 Ch., at p. 32; *Re Geikie*, 27 T. L. R. 484.

(*u*) 5 W. R. 815, also reported (but obscurely) 3 Jur. (N.S.) 790.

(*x*) L. R., 4 Eq. 521. See also *Langford* v. *Gowland*, 3 Gif. 617; *Makeown* v. *Ardagh*, Ir. R., 10 Eq. 445. But see the observations of Lord Selborne, C., in *Chamberlayne* v. *Brockett*, L. R., 8 Ch. 211.

point might some day require further consideration, he could not interfere with the settled authorities.

Clark v. *Taylor* and *Fisk* v. *Att.-Gen.* were followed by Pearson, J., in *Re Ovey* (*y*), and by the Court of Appeal in *Re Rymer* (*z*), where the authorities were discussed at length.

The question sometimes arises as to the degree of failure or cesser of a charitable institution which will constitute a lapse. Thus, in *Re Waring* (*a*), a testatrix bequeathed a legacy to the "St. A. School," which, at the date of the will, was carried on under a trust deed as a Church of England school under the management of the vicar of the parish; before the death of the testatrix the school ceased to be carried on during the week in accordance with the trust deed, but was used on Sundays as a Sunday school: it was held by Kekewich, J., that the legacy had not lapsed.

Cases where doctrine of lapse is inapplicable.

If the bequest is to a named institution merely as the instrument for executing the testator's charitable intent, which he fully describes, the failure of the institution will not involve the failure of the charitable trust (*b*).

It is also clear that, where the charitable object fails after the testator's death, and before the legacy has been paid, the gift will not lapse. In *Hayter* v. *Trego* (*c*), where the bequest was to "the D. Asylum for Female Penitents," which was dissolved after the testator's death, it was assumed that the legacy was to be applied *cy-près*, the only question argued being whether this should be done by the Crown or by the Court. And in *Re Slevin* (*d*), it was held that a charitable bequest to an institution which ceases to exist after the testator's death, and before the legacy has been paid, does not lapse so as to let in the residuary legatee, but will be applied by the Crown for some analogous purpose of charity, irrespective of whether or not any general

Re Slevin.

(*y*) 29 Ch. D. 560.

(*z*) [1895] 1 Ch. 19. See also *Re Joy*, 60 L. T. 175; *Re Davies' Trusts*, 21 W. R. 154; *Re Adams*, 4 T. L. R. 757 (amalgamation with another institution); *Re Bradfield*, 8 T. L. R. 696 (discontinuance of branch).

(*a*) [1907] 1 Ch. 166. The correctness of the decision may perhaps be doubted; see *Att.-Gen.* v. *Shadwell*, [1910] 1 Ch. 92. In *Re Wilson*, 25 T. L. R. 465, a bequest to a charitable institution which before the death of the testator had been divided into two institutions was apportioned between them. In *Re Faraker*, [1912] 2 Ch. 488, the charity had been consolidated with others. See also *Re Wedgwood*, [1914] 2 Ch. 245, where there had been a change in the body which managed the Home which was to be benefited.

(*b*) *Marsh* v. *Att.-Gen.*, 2 J. & H. 61. Compare *Att.-Gen.* v. *Stephens*, 3 My. & K. 374 (abolition of office); *Re Rymer*, [1895] 1 Ch. 19; *Re Mann*, [1903] 1 Ch. 232.

(*c*) 5 Russ. 113.

(*d*) [1891] 2 Ch. 236, reversing the decision of Stirling, J., [1891] 1 Ch. 373; *Re Soley*, 17 T. L. R. 118; *Re Cunningham*, [1914] 1 Ch. 427. Compare the cases cited *ante*, p. 225, n. (*m*), in some of which the particular scheme which the testator had in mind could not be carried out.

charitable intention that the fund shall be administered *cy-près* is indicated by the will, on the ground that, as the charity existed at the testator's death, the legacy became the property of that charity.

The case of *Marsh* v. *Means* (*e*), above cited, was not an ordinary case of lapse, because the object of the gift had ceased to exist before the date of the will. Probably the decision turned on the specific nature of the gift, and if it had been expressed in more general terms effect might have been given to it. Thus in *Coldwell* v. *Holme* (*f*), a testatrix bequeathed £200 to "The Benevolent Institution for X" (describing the charitable objects of the institution), an institution which had existed, but had ceased to exist at the date of the will; there was, however, at the date of the will an old-established society called "The Royal M. Society for X.," and it was held that this society was entitled to the legacy. Possibly the same result might have been reached by applying the doctrine of *cy-près*.

Doctrine of *cy-près* applied where bequest not required.

In *Re Buck* (*g*), a legacy was bequeathed to a friendly society which was established to provide annuities for its members and their widows and children, if in distressed circumstances; the legacy was not required, because the funds of the society were sufficient to provide for the surviving annuitants: it was held that the legacy had not lapsed and was applicable *cy-près*.

Where institution never existed.

If there is a gift to a charitable institution by name, and no such institution can be found to have existed, this does not necessarily prevent the legacy from being successfully claimed by another institution, similar in name or in object to the non-existent institution (*h*). If, however, there is no institution which can establish its claim, it will generally be presumed that the testator, in naming the institution, merely intended to indicate the purpose to which he wished the legacy applied, for it is clear he could not have intended to benefit a particular institution, and the legacy will be applied *cy-près* (*i*).

Where there are several charities equally answering the description.

It sometimes happens that a legacy is given to a particular institution by a description equally applicable to more than one.

(*e*) 5 W. R. 815.

(*f*) 2 Sm. & G. 31; *Re Magrath*, [1913] 2 Ch. 331.

(*g*) [1896] 2 Ch. 727. A friendly society is not *prima facie* a charitable institution, and if it comes to an end its funds are not applicable *cy-près*; *Cunnack* v. *Edwards*, [1896] 2 Ch. 679; *Braithwaite* v. *Att.-Gen.*, [1909] 1 Ch. 510. See also *Tierney* v. *Tough*, [1914] 1 Ir. R. 142.

(*h*) See the cases referred to *infra*, n. (*k*), and *post*, pp. 1222, 1223.

(*i*) *Loscombe* v. *Wintringham*, 13 Bea. 87; *Re Maguire*, L. R. 9 Eq. 632; *Re Rymer*, [1895] 1 Ch. 19; *Re Davis*, [1902] 1 Ch. 876.

It cannot here be presumed that the testator did not intend to select one in particular; for he may have known, and, considering the terms of the bequest, probably did know, only one answering the description; yet, as it cannot be ascertained which, the particular purpose fails; nevertheless it is clear that the legacy will be applied *cy-près*, or divided between the two institutions (*k*).

Where legacy conditional.

Cherry v. *Mott* (*l*) shows that there may be a conditional legacy to a charity as well as for any other purpose, and that if the condition is not fulfilled the legacy fails in substance. And if the condition is such that it need not be performed within the limits allowed by the Rule against Perpetuities, the gift is void (*m*). Such cases must be distinguished from those where the intention is to give a fund to charity at once, though there may be an indefinite suspense or abeyance in its actual application. If the particular purposes may be answered, though not immediately, the fund will be retained—how long does not clearly appear: but if those purposes turn out on inquiry to be impracticable, then the fund will be applied *cy-près*. And during such retention there is no resulting trust for heir or next-of-kin (*n*).

Where charitable purposes do not exhaust the fund.

It has been already mentioned that where a testator shows an intention to devote certain property to charitable purposes, and fails to specify all or some of them, the property so undisposed of will be applied *cy-près* (*o*). It is also explained in a subsequent chapter (*p*) that gifts to charity are an exception to the doctrine of resulting trusts in this respect, that where property is given to a charity and the income afterwards increases, so that there is a surplus after satisfying the purposes for which it was given, this surplus is also, as a general rule, applicable *cy-près*.

Surplus income.

Modification of scheme in will.

In *Re Harrison* (*q*), the testator gave a legacy upon trust to found a musical scholarship. The trustees objected to certain of the provisions of the scheme laid down in the will. It was held that the trustees had power to modify these so long as they did not depart essentially from the scheme.

(*k*) *Bennett* v. *Hayter*, 2 Bea. 81; *Re Clergy Society*, 2 K. & J. 615; *Re Alchin's Trusts*, L. R. 14 Eq. 230, and the other cases cited above, p. 225.

(*l*) 1 My. & C. 123, *ante*, p. 228.

(*m*) As to the application of the Rule against Perpetuities to charities, *post*, p. 342.

(*n*) *Att.-Gen.* v. *Oglander*, 3 Br. C. C. 166; *Abbott* v. *Fraser*, L. R., 6 P. C. 96; *Chamberlayne* v. *Brockett*, L. R. 8 Ch. 206; *Biscoe* v. *Jackson*, 35 Ch. D. 460; *Re Robinson*, [1892] 1 Ch. 95; *Re Villers-Wilkes*, 72 L. T. 323, and *Re Cranmer*, Times Newspaper, November 17, 1928.

(*o*) *Ante*, pp. 224 *seq.*

(*p*) Chap. XXI. *Re Ashton's Charity*, 27 Bea. 115.

(*q*) 113 L. T. 308.

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Cases within the Mortmain Acts before 1892.

It remains to be noticed, that the *cy-près* doctrine does not apply to bequests which are made void by the Mortmain Act of 1736 or 1888, and therefore a bequest of money to be laid out in land is not executed *cy-près*, *i.e.*, applied to an allowed charitable purpose. But an express gift over, in case the charitable gift cannot by law take effect, is valid (*r*).

Illegal purposes.

The reason preventing a gift which was void under the Mortmain Act from being applied *cy-près*, namely that it is made void by the statute, also applies to other gifts for purposes which are expressly forbidden (*s*). And a similar rule applies to a bequest, if the purposes for which it is made are illegal because they are contrary to the policy of the law; see Sect. 1 of this chapter. But where the reason why a bequest cannot be applied in a particular way is that, although not expressly forbidden, it nevertheless contravenes the policy of a statute, then if the main object of the bequest is charitable and is sufficiently general it will be applied *cy-près*. Thus in *Da Costa* v. *De Pas* (*t*), a bequest for instructing people in the Jewish religion was held to be contrary to the law relating to the Established Church, and was applied *cy-près*. So in *Cary* v. *Abbot* (*u*), a bequest for bringing up poor orphan children in the Roman Catholic faith was held to be void only in the manner and not in the substance, and was applied *cy-près*. Such bequests would, at the present-day, be held to be legal in all respects (*x*). In *Att.-Gen.* v. *Vint* (*y*), a bequest for providing the inmates of a workhouse with fermented liquor was directed to be administered *cy-près*, in such a way as not to contravene the provisions of the law relating to workhouses. But if the testator has no general charitable intention and has only a particular object in view, which is illegal, then the bequest fails altogether (*z*).

(*r*) *Att.-Gen.* v. *Tancred*, 1 Ed. 10, 1 W. Bl. 90, Amb. 351; *De Themmines* v. *De Bonneval*, 5 Russ. 288; *Robinson* v. *Robinson*, 19 Bea. 494; *Carter* v. *Green*, 3 K. & J. 591; *Warren* v. *Rudall*, 4 *ib.* 618; and *per* Lord Eldon, *Sibley* v. *Perry*, 7 Ves. 522; overruling *Att.-Gen.* v. *Hodgson*, 15 Sim. 150, The grounds of the decision in *Att.-Gen.* v. *Hodgson*, 15 Sim. 150, show that it is not an authority against the validity of such a gift over. But as to those grounds, see *Warren* v. *Rudall*, 4 K. & J. 603.

(*s*) See *Att.-Gen* v. *Whorwood*, 1 Ves. Sen. 534; *Moggridge* v. *Thackwell*, 7 Ves. 36; *Sims* v. *Quinlan*, 16 Ir. Ch. 191; 17 Ir. Ch. 43, where the subject is discussed. The *dicta* of the Judges in the various cases are not easy to reconcile.

(*t*) Amb. 228. If the bequest had been merely in aid of worship in accordance with the Jewish religion, it would apparently have been good even in 1754; see 3 Mer. p. 393, n.

(*u*) 7 Ves. 490, and see *per* Lord Eldon, 17 Ves. p. 487.

(*x*) See the enactments and cases referred to, *ante*, p. 195, and the general principle in favour of gifts for religious purposes, stated *ante*, p. 203.

(*y*) 3 De G. & S. 704.

(*z*) See *per* M. R. in *Att.-Gen.* v. *Hurst*, 2 Cox, 364; *Carbery* v. *Cox*, 3 Ir. Ch. R. 231.

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Whether the Crown or the Court administers charity.

The general law of charities is beyond the scope of this treatise, but it may be mentioned that with respect to the particular cases in which the Crown, and those in which the Court, undertakes the office of administering charities, the distinction seems to be, that where the bequest is by the intervention of trustees, even though those trustees die in the testator's lifetime or refuse to act, it devolves upon the Court (*a*); but where the object is charity without a trust interposed, the direction must be by the sign manual of the Sovereign (*b*). Accordingly, in *Re Pyne* (*c*), where the testatrix gave her residuary estate to trustees in trust for such charitable purposes as she might thereafter specify by codicil, and she failed to do so, it was held that the Court had jurisdiction to direct a scheme. In a case (*d*) where there was a bequest to a voluntary charitable society, which existed when the will was made, and also at the death of the testator, but was dissolved before his assets could be administered, it was held that the execution devolved on the Court. But this decision seems to have proceeded partly on the ground that the testator showed a general charitable intention; and in *Re Slevin* (*e*), where there was a legacy to a charitable institution which was in existence at the death of the testator, but ceased to exist before the legacy was paid, it was held that the legacy fell to be administered by the Crown.

Both the Crown and the Court, however, in the exercise of their discretion, alike act upon the principle of adhering as closely as possible to the spirit of the donor's expressed or presumed intention (*f*).

Where the testator's object is sufficiently defined, and is capable of being carried into effect, it will not be departed from upon a notion of more extended utility (*g*).

Crown charity.

In *Wallis* v. *Sol.-Gen. for New Zealand* (*h*), the question was raised whether, if a charity instituted by a Crown grant to trustees becomes impossible of performance, the Court has juris-

(*a*) *Moggridge* v. *Thackwell*, 7 Ves. 36; *Paice* v. *Archbishop of Canterbury*, 14 Ves. 364; *Att.-Gen.* v. *Gladstone*, 13 Sim. 7; *Reeve* v. *Att.-Gen.*, 3 Hare, 191; *Pocock* v. *Att.-Gen.*, 3 Ch. D. 342; *Re Huxtable*, [1902] 2 Ch. 793. But the Court frequently dispenses with a scheme if the testator has given his trustees an absolute discretion of determining the objects of a charitable gift: *ante*, p. 216.

(*b*) *Att.-Gen.* v. *Fletcher*, 5 L. J. (N.S.) Ch. 75, Pepys, M.R.; *Denyer* v. *Druce*, Taml. 32; *Kane* v. *Cosgrave*, Ir. R. 10 Eq. 211. See *Att.-Gen.* v. *Herrick*, Amb. 712, and the note to *Da Costa* v. *De Pas*, Amb. 228. In *Felan* v. *Russell*, 4 Ir. Eq. 701, the trustee died before a scheme was settled.

(*c*) [1903] 1 Ch. 83.

(*d*) *Hayter* v. *Trego*, 5 Russ. 113.

(*e*) [1891] 2 Ch. 236.

(*f*) 7 Ves. 87.

(*g*) *Att.-Gen.* v. *Whiteley*, 11 Ves. 241.

(*h*) [1903] A. C. 173.

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diction to administer it *cy-près*, but in the view of the case taken by the Judicial Committee, the point became immaterial (*i*).

Where the Court will pay legacies to a charity without a scheme.

Where a pecuniary legacy is bequeathed absolutely to a person, to be applied for such charitable purposes as he may in his discretion select, or is bequeathed absolutely to a corporation existing only for charitable purposes, the Court will direct payment, without requiring that a scheme be settled for its appropriation (*k*). And the same rule obtains where a legacy is given to the treasurer or other officer of a charitable institution, though not a corporation, to become part of the general funds of that institution (*l*). But where the legacy is to be applied, not as part of the general funds of the institution, but for certain permanent charitable trusts, which the testator has pointed out, the Court will take upon itself to insure the accomplishment of the testator's object by a scheme of its own (*m*).

Continuing condition.

And if a legacy is bequeathed for a charitable purpose, subject to a continuing condition, the fund may be retained in Court and the income paid out so long as the condition is complied with (*n*).

Foreign charity.

Where a legacy is given to a foreign charity, the Court will direct it to be paid to the persons appointed by the testator to receive it, and will not take upon itself to administer the fund (*o*). Nevertheless the Court has jurisdiction to secure a legacy given for charitable purposes by a subject of the Crown, whether in or out of this country, and will sometimes order the fund to be carried to a separate account in Court, and the income only paid over to the person named in the will, subject

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(*i*) Their lordships held that the donors were certain Maori chiefs. The Court of Appeal in New Zealand thought that the Crown was the grantor, as the natives had merely a right of occupation, and not a legal title which they could transfer to anyone else; this seems the correct view (see [1901] A. C. p. 567). The Court of Appeal also thought that, according to the law of New Zealand, the Crown, as *parens patriae*, has the duty not only of enforcing charitable trusts, but also of protecting the rights of the natives in respect of land occupied by them, and that where these two duties conflict, the Court may have a difficulty in applying the doctrine of *cy-près*. The Judicial Committee failed to appreciate this point.

(*k*) *Waldo* v. *Caley*, 16 Ves. 206; *Horde* v. *Earl of Suffolk*, 2 My. & K. 97; *Warren* v. *Clancy*, [1898] 1 Ir. R. 512; *Richardson* v. *Murphy*, [1903] 1 Ir. R. 227; *Society for the Propagation of the Gospel in Foreign Parts* v. *Att.-Gen.*, 3 Russ. 142; *Walsh* v. *Gladstone*, 1 Phil. 290.

(*l*) See *Wellbeloved* v. *Jones*, 1 S. & St. 43; *Re Barnett*, 29 L. J. Ch. 871; *Re Lea*, 34 Ch. D. 528; *In b. McAuliffe*, 44 W. R. 304.

(*m*) *Ib.*; *Corp. of Sons of the Clergy* v. *Mose*, 9 Sim. 610.

(*n*) *Re Robinson*, [1892] 1 Ch. 95; [1897] 1 Ch. 85; [1923] 2 Ch. 332.

(*o*) *Provost, etc., of Edinburgh* v. *Aubery*, Amb. 236; *Collyer* v. *Burnett*, Taml. 79; *Mitford* v. *Reynolds*, 1 Phil. 194; *Emery* v. *Hill*, 1 Russ. 112. See *Mayor of Lyons* v. *East India Company*, 1 Moo. P. C. C. 293. In *Re Fraser*, 22 Ch. D. 827, a bequest was given for the benefit of the blind in Inverness-shire, and, the executor having declined to act, leave was given to the Attorney-General to apply to the Scottish Court for the settlement of a scheme. Compare *Forbes* v. *Forbes*, 18 Bea. 552.

to an account of the mode of its application (*p*). And if a fund is given to English trustees to be retained and invested in this country, for the benefit of a foreign charity, the Court has jurisdiction (which it will exercise in a proper case) to settle a scheme (*q*).

As already explained, the Court will not apply the *cy-près* doctrine to a foreign charity, unless the trustees are within the jurisdiction (*r*).

Charity Commissioners.

It will, of course, be remembered that under the Charitable Trusts Acts, 1853 to 1925, the Charity Commissioners, and in some cases the Board of Education, have power to frame schemes for the application or management of endowed charities (*s*). Such schemes ought to be framed in accordance with the doctrine of *cy-près*, and if any scheme is framed on a wrong principle the Court will vary it (*t*).

The Georgian Mortmain Act.

VI. The Mortmain Acts of 1736 and 1888.—The Statute of 9 Geo. 2, c. 26, which is commonly called the Statute of Mortmain or the Georgian Mortmain Act (although in fact it has nothing to do with mortmain), made it impossible for any land or interest in land to be devised by will for any charitable use after June 24, 1736. This Act was repealed and in substance re-enacted by Part II of the Mortmain and Charitable Uses Act, 1888, in which Act land is defined to include any estate or interest in land. This definition was repealed by section 3 of the Mortmain and Charitable Uses Act, 1891 (*u*), which provided that "land" should not include money secured on land or other personal estate arising from or connected with land. Section 5 of the same Act enabled land to be devised by will to or for the benefit of any charitable uses, but required that such land should be sold within a year from the testator's death. Under the Acts of 1743 and 1888, the questions which arose were what was an interest in land within the meaning of these Acts, and what occurred when a charitable gift was made by will out of a mixed fund of land and pure personalty. These questions are fully dealt with in the earlier editions of this treatise and will be omitted here as they do not arise where

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(*p*) *Att.-Gen.* v. *Lepine*, 2 Sw. 181; *Att.-Gen.* v. *Sturge*, 19 Bea. 597.

(*q*) *Re Vagliano*, 75 L. J. Ch. 119.

(*r*) *New* v. *Bonaker*, L. R. 4 Eq. 655, *ante*, p. 226. The subject is discussed in *Re De Noailles*, 114 L. T. 1089.

(*s*) See for example *Re Peel's School*, L. R., 3 Ch. 543; *Re Gilchrist Educational Trust*, [1895] 1 Ch. 367. Educational charities are now under the control of the Board of Education : Board of Education Act, 1899; Orders in Council, 1900 to 1902.

(*t*) *Re Campden Charities*, 18 Ch. D. 310.

(*u*) See *post*, p. 243.

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the testator died after August 5, 1891. But there were various exemptions from the Acts of 1736 and 1888, and it is necessary to consider these, because in such cases there is no need to call in aid the Act of 1891. These exceptions from the statutory restraint will be mentioned before the provisions of the Act of 1891 are considered.

Charitable corporations.

VII. Exceptions from the Statutory Restraint.—Where a corporation for charitable purposes is empowered by private Act of Parliament (passed since 9 Geo. 2, c. 36) to acquire land by devise, this has the operation of enabling any testator to devise land or bequeath impure personalty to the corporation (*x*). But a private Act passed before 1736 has not that operation, even if it is in effect re-enacted by an Act passed since 1736 (*y*).

And an Act of Parliament which confers on a charitable corporation the right to purchase, take, hold, receive, or enjoy lands, does not enable it to acquire land otherwise than in the mode prescribed by the statute Geo. 2, c. 36, the effect of the clause being equivalent only to a licence from the Crown to hold in mortmain (*z*), and not therefore enabling it to take by devise.

Exception in favour of two English Universities, and Eton, Winchester, and Westminster.

The Act of Geo. 2, expressly allowed gifts to the two English Universities and their colleges, and the three colleges of Eton, Winchester, and Westminster (*a*). And by the seventh section of the Act of 1888 this exception is extended to the Universities of London and Durham, the Victoria University, and their colleges and houses of learning, and to Keble College, Oxford. It is clear that neither statute authorises a devise to a college in trust for other charitable objects (*b*); but it seems not to be

(*x*) *Perring* v. *Trail*, L. R., 18 Eq. 88. So trustees having a power of selecting charities to benefit by a testamentary gift may select charities empowered to acquire lands by devise: see *Re Ovey*, 31 Ch. D. 113. In *Robinson* v. *London Hospital*, 10 Ha. 19, the power to devise lands was given by charter. The judgment of Turner, V.-C., is somewhat cryptic, and it is not easy to say what his decision was. It is clear that the gift failed as to part of the residue.

(*y*) *Luckraft* v. *Pridham*, 6 Ch. D. 205.

(*z*) *Mogg* v. *Hodges*, 2 Ves. 52; *British Museum* v. *White*, 2 S. & St. 594; *Nethersole* v. *Indigent Blind School*, L. R. 11 Eq. 1; *Chester* v. *Chester*, L. R., 12 Eq. 444. See and consider with reference to this point, 13 & 14 Vict. c. 94, s. 23, enabling owners of impropriated tithes to annex the same to the parsonages, etc., of the parishes where they arise, *Denton* v. *Manners*, 25 Bea. 38, 2 De G. & J. 675.

(*a*) For an instance of such a devise, see 3 Ves. 641. It has never been decided whether this exception extended to colleges founded since the Act, as Downing College, Cambridge. Lord Northington considered that it was confined to colleges antecedently established, see *Att.-Gen.* v. *Tancred*, 1 Ed. 16; but Lord Loughborough appears to have dissented from this opinion, see *Att.-Gen.* v. *Bowyer*, 3 Ves. 728. As to London University see University College, London (Transfer) Act, 1905, s. 53 (5).

(*b*) *Att.-Gen.* v. *Tancred*, 1 Ed. 15, 1 W. Bl. 90, Amb. 351; see also *Blandford* v. *Fackerell*, 4 Br. C. C. 394, 2 Ves. jun. 238; *Att.-Gen.* v *Munby*, 1 Mer. 327.

essential that the trust should embrace the whole college; a trust for the benefit of particular members would be within the proviso; and therefore, a devise to the Master and Fellows of Christ's College, in trust that they and their successors should apply the rents for some undergraduate student, has been held to be good (*c*). But the devise must be for collegiate or academical purposes; and a gift to the college, to the intent that an individual member (the senior fellow for the time being) should live in the testator's house, and entertain the poor, and distribute medicine and books among them, was held to be void on this principle (*d*). Lord Loughborough appears to have thought that if a devise of real estate to a college was refused by the college, as of course it may be, whether the devise be upon trust or otherwise (*e*), it might, as the lands were originally devised to a valid purpose, be executed *cy-près* (*f*).

Exception in respect of Scotland.

The exception made by the Act of Geo. 2 in respect of property in Scotland, has been held to apply only to the locality of the lands destined to the trust (*g*); precluding, therefore, the devise of lands in England to a Scottish charity, but admitting of English personalty being bequeathed to be laid out in lands in Scotland, so far as is consistent with Scots law, which permits the destination of real estate to some kinds of charity (*h*). It has been held that the circumstances of the charity being Scottish, and Scotsmen only being eligible as trustees of it, do not conclusively show that the purchase is to be of lands in Scotland, so as to take the bequest out of the statute (*i*).

Purchase of lands in Ireland.

So, a bequest of money to be laid out in lands in Ireland, for charitable purposes, will be good (*k*). But by a statute of 1844 (*l*) it is enacted that any donation, devise, or bequest,

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(*c*) *Att.-Gen.* v. *Tancred*, 1 Ed. 10.

(*d*) *Att.-Gen* v. *Whorwood*, 1 Ves. 534.

(*e*) See 2 Kee. 163.

(*f*) *Att.-Gen.* v. *Andrew*, 3 Ves. 633.

(*g*) A devise of land in England for charitable purposes is not made valid by the fact that the testator is a domiciled Scotsman: *Re Hewit*, [1891] 3 Ch. 568.

(*h*) *Oliphant* v. *Hendrie*, 1 Br. C. C. 571; *Curtis* v. *Hutton*, 14 Ves. 537; *Mackintosh* v. *Townsend*, 16 Ves. 330. And the English rule, arising out of the Act, against marshalling in favour of charities, does not exist in Scotland. See *Macdonald* v. *Macdonald*, L. R., 14 Eq. 60.

(*i*) *Att.-Gen.* v. *Mill*, 3 Russ. 328, 5 Bli. (N.S.) 593, 2 D. & Cl. 393, Sugd. Law of Prop. 419. If the testator had been domiciled in Scotland, the bequest would have been valid: *Canterbury* (*Mayor, etc., of*) v. *Wyburn*, [1895] A. C. 89, *post*, p. 240.

(*k*) See *Campbell* v. *Earl of Radnor*, 1 Br. C. C. 271; *Baker* v. *Sutton*, 1 Kee. 234; *Att.-Gen.* v. *Power*, 1 Ba. & Be. 154.

(*l*) 7 & 8 Vict. c. 97, s. 16. A deed must also be registered within the same period, *ib.* Cases under the Act are *Donnellan* v. *O'Neill*, Ir. R., 5 Eq. 523; *Stewart* v. *Barton*, Ir. R. 6 Eq. 215; *Murland* v. *Perry*, 3 L. R. Ir. 135; *Re Moore*, [1907] 1 Ir. R. 315; *ante*, p. 193.

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whereby any estate in lands, tenements or hereditaments in Ireland is conveyed or created for a charitable purpose, must be executed three calendar months before the death of the donor. This enactment does not, however, appear to extend to bequests of money to be laid out in land.

British colonies.

The statute 9 Geo. 2, c. 36, did not extend to the British colonies; in its causes, its objects, its provisions, its qualifications, and its exceptions it is a law wholly English, calculated for the purposes of local policy, complicated with local establishments, and incapable without great incongruity in the effect, of being transferred, as it stands, into the code of any other country (*m*). There is therefore nothing in the Act of 1736 or 1888 to prevent a person domiciled in a British colony from leaving money for the purchase of land in England for a charitable object; unless prohibited by the law of the colony, such a bequest is valid (*n*).

The Act applies to Ontario (*o*), but not to Quebec (*p*), Cape Colony (*q*), British Honduras (*r*), Grenada (*s*), New South Wales (*t*) or South Australia (*u*).

Foreign land.

Land situate in foreign countries outside the British Empire is obviously not within the Acts. Consequently a bequest of money, to be laid out in the erection of almshouses abroad, is valid so far as the law of England is concerned (*v*).

Nor does either of the Acts prevent money arising from the sale of land in a foreign country from being bequeathed to charities (*x*).

Custom of London.

By the custom of London resident freemen might devise land in mortmain (*y*). By the general Act De Religiosis (*z*) the custom would have been abolished, but that afterwards there came a general confirmation of the customs of London by statute (*a*).

(*m*) Per Sir W. Grant, M.R., in *Att.-Gen.* v. *Stewart*, 2 Mer. 143; see also *Att.-Gen.* v. *Giles*, 5 L. J. (N.S.) Ch. 44; *Whicker* v. *Hume*, 1 D. M. & G. 506, 14 Bea. 509, 7 H. L. C. 124; *Mayor of Lyons* v. *East India Company*, 1 Moo. P. C. C. 298; *Jex* v. *McKinney*, 14 App. Ca. 77. The same considerations evidently apply to the act of 1888.

(*n*) *Canterbury (Mayor, etc., of)* v. *Wyburn*, [1895] A. C. 89. The validity of a devise of land in England for charitable purposes is not affected by the testator's domicil: see *Re Hewit*, [1891] 3 Ch. 568.

(*o*) *Re Hoyles*, [1911] 1 Ch. 179 (mortgage debt).

(*p*) *Abbott* v. *Fraser* L. R. 6 P. C. 96.

(*q*) *Re Arnold* 37 Ch. D., at p. 643.

(*r*) *Jex* v. *McKinney*, 14 A. C. 77.

(*s*) *Att.-Gen.* v. *Steward*, 2 Mer. 143.

(*t*) *Whicker* v. *Hume*, 7 H. L. C. 124.

(*u*) *Re Dawson*, [1915] 1 Ch. 626.

(*v*) *Re Geck*, 69 L. T. 819.

(*x*) *Beaumont* v. *Oliviera*, L. R., 6 Eq. 534, 4 Ch. 309. See *Re Rea*, [1902] 1 Ir. R. 451.

(*y*) 8 Rep. 129 a.

(*z*) 7 Ed. 1, c. 1.

(*a*) *Per* Lord Coke, 2 Bulst. 190. And local customs are expressly saved by the statute 23 Hen. 8, c. 10, s. 5.

There is no saving of any custom in the statute of George, any more than there was in the statute De Religiosis; and as there has been no subsequent confirmation of the customs of London (*b*), it follows, according to Lord Coke, that the statute of George was binding on the city of London (*c*). At all events, it is clear that the custom of London applies only to lands in London (*d*).

Statutes allowing land to be devoted to particular charities.

The Legislature has, in several instances, relaxed in favour of particular objects the restriction on disposing of land to charitable purposes (*e*). Thus, by the Land Tax Redemption Act (42 Geo. 3, c. 116, s. 50), money may, by will or otherwise, be given to be applied in the redemption of the land tax on hereditaments settled to charitable uses. So, the statute 43 Geo. 3, c. 107, authorises the devise of lands to the Governors of Queen Anne's Bounty; and again, the Gifts for Churches Act, 1803 (stat. 43 Geo. 3, c. 108), empowers persons, by will executed three months before death, to devise lands not exceeding five acres, or goods and chattels not exceeding in value £500 (*f*) for erecting, rebuilding, repairing, purchasing, or providing any church or chapel where the liturgy of the Church of England may be used,

Gifts for churches.

(*b*) The latest confirmation by statute appears to be 2 W. & M. sess. 1, c. 8, s. 3.

(*c*) See also *per* Sir R. P. Arden, M.R., Highmore on Mortmain, p. 127; and see generally as to these customs the authorities cited in *Reg.* v. *Mayor, etc., of London*, 13 Q. B. 1, and Chapter III of Tyssen on Charitable Bequests.

(*d*) *Middleton* v. *Cater*, 4 Br. C. C. 409. If the custom has still any force, it is saved by 51 & 52 Vict. c. 42, s. 12.

(*e*) By sect. 8 of the Mortmain and Charitable Uses Act, 1888, it is enacted that "where by any statute now in force any provision of the enactments hereby repealed is excluded either wholly or partially from application, or is applied with modification, in every such case the corresponding provision of this act shall be excluded or applied in like extent and manner."

(*f*) By section 2, if the devise exceed the limit, the excess only is void, and the specific five acres may be allotted by the L.C. As to the case of a bequest of personalty exceeding £500, see *Girdlestone* v. *Creed*, 10 Ha. 480. In *Sinnett* v. *Herbert*, L. R., 7 Ch. 232, a gift comprising pure and impure personalty, for building or endowing a church, was held to carry £500 worth of the impure personalty, besides all the pure personalty, on the ground that the £500 being all which could properly be spent in building (see *Re Ireland's Will*, 12 L. J. Ch. 381), it must be assumed that the trustees would apply all the rest for the other purposes. See also *Dixon* v. *Butler*, 3 Y. & C. 677; *Champney* v. *Davy*, 11 Ch. D. 949. As under this Act, one may devise, he so may convey, reserving a life estate, *per* Sir G. Turner, L.J., *Fisher* v. *Brierley*, 1 D. F. & J. 664. But the Act does not authorise a gift of money, even within the limit of £500, to arise by sale of land, *Church Building Society* v. *Coles*, 1 K. & J. 145, 5 D. M. & G. 324. A devise of land, not exceeding in extent the prescribed limit, with a building upon it, is not invalidated by the secret trust that the devisee shall hold the land and building upon trust to convey the same as and for a parish or district church in perpetuity, *O'Brien* v. *Tyssen*, 28 Ch. D. 372. With regard to bequests of "goods and chattels" for purposes authorised by the Act, it has been held that the limit of £500 has been impliedly repealed by section 7 of the Mortmain, etc., Act, 1891: *Re Douglas*, [1905] 1 Ch. 279. As already noticed (*ante*, p. 59), the Gifts for Churches Act does not remove the disability of coverture: *Re Smith's Estate*, 35 Ch. D. 589.

or any mansion-house for the residence of the minister, or any outbuildings, offices, churchyard (*g*), or glebe, for the same respectively; but no glebe, containing upwards of fifty acres, is to be augmented above one acre (*h*); and the promotion of these or similar objects has been further encouraged by an Act (*i*) legalising the devise of lands to or in trust for (*k*) the Ecclesiastical Commissioners, in aid of the endowment and erection of district churches. Again, the Public Parks, Schools, and Museums Act, 1871, authorised gifts by will, made twelve calendar months before, and inrolled in the books of the Charity Commissioners within six calendar months after, the testator's death, of limited portions of land for any of the objects mentioned in the title to the Act (*l*).

Public parks, schools, museums.

Other exceptions are contained in section 22 of the New Ecclesiastical Districts Act, 1843 (*m*); in 8 & 9 Vict. c. 43 (*n*) (Science and Art Museums); section 33 of the Literary and Scientific Institutions Act, 1854; section 7 of the Recreation Grounds Act, 1859; The Technical and Industrial Institutions Act, 1892; section 2 of the Ancient Monuments Consolidation and Amendment Act, 1913 (*o*); section 1 of the Working Class Dwellings Act, 1880; section 8 of the Housing, Town Planning, etc., Act, 1909; section 8, sub-section 1 (h) of the Local Govern-

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(*g*) A bequest for maintenance of a family vault in a churchyard cannot be supported as one for repair of a churchyard under this Act, *Re Rigley's Trusts*, 36 L. J. Ch. 147; *Re Vaughan*, 33 Ch. D. 187. But a bequest for keeping a churchyard in repair is within the Act: *ibid.* As to a church clock, see *Re Hendry*, 56 L. T. 908.

(*h*) See also 55 Geo. 3, c. 147, and 58 Geo. 3, c. 45, s. 33.

(*i*) The New Parishes Act, 1843, s. 22.

(*k*) *Baldwin* v. *Baldwin*, 22 Bea. 425.

(*l*) 34 Vict. c. 13. This Act is repealed by the Mortmain and Charitable Uses Act, 1888, but in effect re-enacted by the sixth section of that Act, which provides (1) that Parts I. and II. of the Act shall not apply to an assurance by will of land, or of personal estate to purchase land, for a public park, school-house for an elementary school, or public museum; and (2) "that a will containing such an assurance . . . must be executed not less than twelve months before the death of the assuror, or be a reproduction in substance of a devise made in a previous will in force at the time of such reproduction, and which was executed not less than twelve months before the death of the assuror, and must be enrolled in the books of the Charity Commissioners within six months after the death of the testator." By sub-section 3 the quantity of land assured must not exceed 20 acres for a park, 2 acres for a school-house, or 1 acre for a museum. The terms "public park," "school-house," "elementary school" and "public museum" are defined in sub-section 4 of this section. The Acts 4 & 5 Vict. c. 38 (school sites), 31 & 32 Vict. c. 44 (sites for religious, educational, literary, etc., purposes), and the Elementary Education Act, 1873, s. 13, sub-s. 3, exclude gifts by will. The provisions of the Act of 31 & 32 Vict. here referred to, are repealed by the Act of 1888, but virtually re-enacted, with the like exclusion of gifts by will, by section 7 (ii) of the latter Act.

(*m*) Explained by 7 & 8 Vict. c. 94, s. 7, and extended by 14 & 15 Vict. c. 47, s. 29, and 19 & 20 Vict. c. 104, s. 4. *Baldwin* v. *Baldwin* (No. 2), 22 Bea. 419.

(*n*) *Harrison* v. *Corporation of Southampton*, 2 Sm. & G. 387. See the Public Libraries Act, 1850, and 18 & 19 Vic. c. 70.

(*o*) See the Ancient Monuments Act, 1882.

ment Act, 1894; and The Sailors and Soldiers (Gifts for Land Settlement) Act, 1916.

Educational purposes.

By section 117, sub-section 1 of the Education Act, 1921, which re-enacts section 46, sub-section 1 of the Education Act, 1918, any assurance of land for educational purposes is exempt from the restrictions of the Mortmain and Charitable Uses Acts, 1888 and 1891 (*p*). The Statute of Mortmain has also been repealed *pro tanto* in favour of the British Museum (*q*), the Imperial War Museum (*r*), the Department of Science and Art (*s*), the Bath Infirmary (*t*), Greenwich Hospital (*u*), Westminster (*x*), Middlesex (*y*), and St. George's Hospitals (*z*), the Royal Naval Asylum (*a*), the Seamen's Hospital Society (*b*), and of some other public institutions (*c*).

Parochial Church Council.

Under section 5 of the Parochial Church Council (Powers) Measure, 1921, a parochial church council may acquire land for any ecclesiastical purpose affecting the parish.

Mortmain, etc., Act, 1891.

VIII. The Mortmain and Charitable Uses Act, 1891.—This Act applies to wills of testators dying after August 5, 1891. Section 3 repeals the definition of "land" in the Act of 1888, and enacts that "land" in that Act shall include tenements and hereditaments, corporeal and incorporeal, of any tenure, but not money secured on land, or other personal estate arising from or connected with land. Section 5 enacts that land may be assured by will to or for the benefit of any charitable use, but that such land [*sic*] shall, notwithstanding anything in the will contained to the contrary, be sold within one year from the death of the testator, or such extended time as the Court or the Charity Commissioners may determine. Section 6 enacts that so soon as the time limited for the sale of any lands under any such assurance shall have expired without completion of the sale of the land, the land unsold shall vest forthwith in the Official Trustee of Charity

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(*p*) *Re Harrow School Governors & Murray's Contract*, [1927] 1 Ch. 556. See the earlier law as to a school-house in section 23, sub-section 5 of the Education Act, 1902.

(*q*) See stat. 5 Geo. 4, c. 39.

(*r*) 10 & 11 Geo. 5, c. 16, s. 1.

(*s*) 38 & 39 Vict. c. 68. This Act does not expressly refer to 9 Geo. 2, c. 36; and according to a suggestion of James, L.J. (6 Ch. D. 212), the case is therefore not taken out of the statute Geo. 2. It is submitted that there is no foundation for the doubt. See above, p. 238.

(*t*) 19 Geo. 3, c. 23; see *Makeham* v. *Hooper*, 4 Br. C. C. 153.

(*u*) 10 Geo. 4, c. 25, s. 37.

(*x*) 6 Geo. 4, c. 20 (loc. and pers.).

(*y*) 6 Will. 4, c. 7 (loc. and pers.).

(*z*) 4 Will. 4, c. 38 (loc. and pers.). See as to these hospitals, *Re Ovey*; *Broadbent* v. *Barrow*, 31 Ch. D. 113.

(*a*) 51 Geo. 3, c. 105.

(*b*) 3 & 4 Will. 4, c. 9, s. 1.

(*c*) See Tudor on Charities, notes to section 8 of the Act of 1888.

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Lands, and the Charity Commissioners shall take all necessary steps for the sale or completion of the sale of such land to be effected with all reasonable speed by the administering trustees for the time being thereof. Section 7 enacts that any personal estate by will directed to be laid out in the purchase of land to or for the benefit of any charitable uses shall, except as hereinafter provided, be held to or for the benefit of the charitable uses as though there had been no such direction to lay it out in the purchase of land. Section 8 provides that the High Court, or any Judge thereof sitting at chambers, or the Charity Commissioners, if satisfied that land assured by will to or for the benefit of any charitable use, or proposed to be purchased out of personal estate by will directed to be laid out in the purchase of land, is required for actual occupation for the purposes of the charity and not as an investment, may sanction the retention or acquisition, as the case may be, of such land.

Effect of the Act of 1891.

The effect of this Act is to repeal section 4 of the Mortmain, etc., Act, 1888, so far as it applies to wills, and to allow land to be devised to charities, subject to the provisions of the Act as to sale (*d*). It also allows "impure personalty" to be given to charities, and makes valid a bequest to a charity of money directed to be laid out in the purchase of land (*e*), although the direction is of itself inoperative (*f*). And it removes the limit of £500 imposed by the Gifts for Churches Act, 1803, on gifts of personal property for the purposes of the Act (*g*). As the Act allows a legacy charged on or payable out of land to be given to a charity, it follows that it has rendered unimportant the old rule that assets are never marshalled in favour of a charity (*h*).

Another effect of the Act seems to be to make secret trusts of land for charitable purposes valid, because as a devise of land for charitable purposes is now lawful, there seems no reason for holding a secret trust for similar purposes to be unlawful. This conclusion is in accordance with the principle on which *O'Brien* v. *Tyssen* (*i*) was decided.

The following decisions on the Act of 1891 may be noted.

Construction of will made before the Act.

In *Re Bridger* (*k*) it was decided that if a testator, by a will made before the passing of the Act, gives to a charitable institution such part of his residuary estate "as may by law be given for charitable purposes," and dies after the passing of the Act,

(*d*) *Re Hume*, [1895] 1 Ch. 422.
(*e*) See *Re Sutton*, [1901] 2 Ch. 640.
(*f*) Section 8.
(*g*) *Re Douglas*, [1905] 1 Ch. 279.
(*h*) See *Biggar* v. *Eastwood*, 19 L. R. Ir. 49.
(*i*) 28 Ch. D. 372. *Post*, p. 247.
(*k*) [1894] 1 Ch. 297. See also notes (*t*) to (*y*) below.

What is "land" within section 3.

the operation of the gift is not restricted to property which under the old law could be given for charitable purposes, but includes real estate, or the proceeds thereof. In *Re Hume* (*l*) it was held that an estate in remainder is within the Act; it may, therefore, be validly devised to a charity, but must be sold within the time prescribed by the Act, or the extended time, if any. In *Re Wilkinson* (*m*), and *Re Sidebottom* (*n*), it was decided that where real estate is devised to trustees upon an immediate trust to sell and pay the proceeds to a charity, the gift is one of "personal estate arising from land" within section 3 of the Act, and is not affected by sections 5 and 6; the trustees are not, however, at liberty to postpone the sale indefinitely. In *Re Ryland* (*o*) the testator gave his real and personal estate to trustees upon trust for conversion, but directed that the land should not be sold during the life of his widow without her consent in writing; the rents were payable during the life of the widow as to part to her and as to the remainder to certain charities, and the whole of the residuary estate was given to them on her death: it was held that the reversionary interest of the charities in the proceeds of sale was not "land" within the meaning of the Act, but that the share of the charities in the rents during the widow's life was "land" within the meaning of the Act, and ought to be sold in accordance with section 5.

Bequest of money to be laid out in land, when not within section 7.

In *Re Sutton* (*p*) it was held that a bequest of personalty to be laid out in the acquisition of houses to be let to poor persons at low rent is a valid charitable gift, and not affected by section 7 of the Act.

In *Re Church Patronage Trust* (*q*) it was held that the devise of an advowson, upon trusts requiring the trustees to present a fit and proper person to the living from time to time, was not a devise "to or for the benefit of any charitable use" within the meaning of section 5.

Extension of time.

In *Re Sidebottom* (*r*) it was held that the time limited by section 5 may be extended by the Court when and so often as circumstances render it desirable.

In *Re Verrall* (*s*) the testator devised land to the National Trust for Places of Historic Interest or Natural Beauty, incorporated by the National Trust Act, 1907. It was held that

(*l*) [1895] 1 Ch. 422.
(*m*) [1902] 1 Ch. 841.
(*n*) [1902] 2 Ch. 389.
(*o*) [1903] 1 Ch. 467.
(*p*) [1901] 2 Ch. 640.
(*q*) [1904] 1 Ch. 41, 2 Ch. 643.
(*r*) [1901] 2 Ch. 1. It seems that there is power to extend the time after the statutory period has elapsed: per Byrne, J., in *Re Ryland*, [1903] 1 Ch. at p. 474.
(*s*) [1916] 1 Ch. 100.

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section 21, sub-section 2 of the Act excluded the provision as to the sale within a year of the testator's death.

As to the effect of a gift in a will made before the Act of 1891, but coming into effect after the passing of the Act, of what may be bequeathed by law for charitable purposes, see *Re Bridger* (*t*), *Re Crossley* (*u*), *Re Harris* (*x*), and *Re Groos* (*y*).

Devises to corporations.

The Act does not expressly provide for the case of a devise of land for charitable purposes to a corporation not having a licence to acquire and hold land in mortmain, but as the Act requires land devised to charitable uses to be sold within a certain time and thus prevents the land from being held in mortmain, it seems clear that a devise to a corporation for charitable purposes is not an assurance in mortmain within the meaning of the Act of 1888.

In *Re Scowcroft* (*z*) a devise of land to the vicar of a certain parish and his successors was held good under the Act of 1891, but the point was not taken.

In *Re Stanley's Trust* (*a*) the testator, after referring to a technical trade school, directed his executors, in case he should not have executed a conveyance of the school and premises which by reason of his death within twelve months should become void, to execute and enrol a conveyance. This was held to be a good equitable devise of land.

Secret trust for charity invalidates devise.

IX.—Secret Trusts for Charity.—As Mr. Jarman points out (*b*): "The statute of the 9th Geo. II. cannot be evaded by a secret trust, and the heir may compel a devisee to disclose any promise which he may have made to the testator to devote the land to charity (*c*). And such promise, if denied by the devisee, may be proved by evidence *aliunde* (*d*). The trust, by whatever means established, invalidates the devise (*e*). This

(*t*) [1894] 1 Ch. 297.
(*u*) [1897] 1 Ch. 928.
(*x*) [1912] 2 Ch. 241.
(*y*) [1915] 1 Ch. 572.
(*z*) [1898] 2 Ch. 638.
(*a*) 26 T. L. R. 365.
(*b*) First ed., p. 206.
(*c*) *Boson* v. *Statham*, 1 Ed. 508; *Muckleston* v. *Brown*, 6 Ves. 52; *Martin* v. *Hatton*, cited *ibid.* 61; *Stickland* v. *Aldridge*, 9 Ves. 516; *Paine* v. *Hall*, 18 Ves. 475. So if land be conveyed to trustees for a charitable purpose by deed in other respects conforming to the Act, a secret undertaking with the grantor to reserve the benefit to himself for his life will, if proved, invalidate the conveyance: *Way* v. *East*, 2 Drew. 44; *Fisher* v. *Brierly*, 1 D. F. & J. 643, in which, however, the evidence failed to show any such understanding. *Re West*, [1909] 2 Ch. 180 (specific legacy).
(*d*) *Edwards* v. *Pike*, 1 Cox, 17, 1 Ed. 267; *Re Spencer's Will*, 57 L. T. 519; *Re Wedgwood*, [1915] 1 Ch. 113.
(*e*) *Russell* v. *Jackson*, 10 Hare, 204; *Moss* v. *Cooper*, 1 J. & H. 352; *Springett* v. *Jenings*, L. R. 10 Eq. 488; cf. *McCormick* v. *Grogan*, L. R. 4 H. L. 82. But the devisee took the legal estate.

doctrine evidently assumes that the trust, if legal, would have been binding on the conscience of, and might have been enforced against, the devisee; and this ground failing, the rule does not apply. As where a testator, after devising lands by a will duly attested, declares a trust in favour of charity by an unattested paper or by parol, the statute law, which affords to the devisee a valid defence against any claim on the part of the charity, of course equally defends him against the claim of the heir, founded on the charitable trust (*f*). The case would be different, however, if the devisee had induced the testator to give him the estate absolutely, under an assurance that the unattested paper was a sufficient declaration of the trust for a charity" (*g*).

And if the testator communicates to the devisee that the devise is made to him for charitable purposes which the testator means to specify, and the testator dies without doing so, it seems clear that the devisee will hold the land upon trust for the heir-at-law (*h*).

Secret trust, when valid.

In cases where the statute does not apply, so that the testator could, if he pleased, have devised the land for certain charitable purposes, a devise to A upon a secret trust for those charitable purposes is valid: as where the testator devises in this manner land which he might have devised under the Church Building Act (*i*).

And it is assumed that, in cases falling within the Mortmain and Charitable Uses Act, 1891, land may be devised upon a secret trust for a charity, with the same effect as if the devise had been made directly to the charity (*k*).

The law relating to secret trusts in general is discussed elsewhere (*l*).

(*f*) *Adlington* v. *Cann*, 3 Atk. 141; *Stickland* v. *Aldridge*, 9 Ves. 519; *Wallgrave* v. *Tebbs*, 2 K. & J. 313; *Lomax* v. *Ripley*, 3 Sm. & Giff. 48; *Jones* v. *Badley*, L. R. 3 Ch. 362; *Re Downing's Estate*, 60 L. T. 140.

(*g*) See *Adlington* v. *Cann*, 3 Atk. 152.

(*h*) *Muckleston* v. *Brown*, 6 Ves. 52; *Re Boyes*, 26 Ch. D. 531; *Russell* v. *Jackson*, 10 Hare, at p. 214.

(*i*) *O'Brien* v. *Tyssen*, 28 Ch. D. 372.

(*k*) *Ante*, p. 244.

(*l*) See Chap. XXIV, *post*, p. 884.

CHAPTER X (*a*).

PERPETUITY AND REMOTENESS.

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Primary meaning of "perpetuity."

I. General Principle forbidding Perpetuities.—A perpetuity in the primary sense of the word, is a disposition which makes property inalienable for an indefinite period.

As a general rule, every such disposition is void (*b*). Accordingly, a devise of land or a bequest of personalty upon trust for a purpose or institution which may last for an indefinite period (not being charitable), is void as a perpetuity, or as tending to a perpetuity. Thus, a trust for the maintenance of a private tomb (*c*), or a picture (*d*), or a private museum, library,

(*a*) This chapter was rewritten by Mr C. Sweet for the sixth edition, see his observations in his preface. It is one of the best statements of this difficult branch of the law, and I have made as few alterations as possible in the present edition (C. P. S.).

(*b*) See the general principle stated in *Re Parry and Daggs*, 31 Ch. D. 130. As this rule is founded on public policy, it applies to British Colonies : *Yeap Cheah Neo* v. *Ong Cheng Neo*, L. R. 6 P. C. 381. The suggestion made by Fry, J., in *Re Parry and Daggs*, that the principle has existed from the earliest times and that the rule in *Shelley's Case* rests on it, is erroneous. The statement of the Real Property Commissioners (cited *post*, p. 344, n. (*n*)), that at common law, properly so called, there was no rule against perpetuities, and the statement of Mr. Gray (Perp. § 141 a (e)) that the question of perpetuity did not arise until the sixteenth century, are historically accurate.

(*c*) *Lloyd* v. *Lloyd*, 2 Sim. (N.S.) 255; *Rickard* v. *Robson*, 31 Bea. 244; *Fowler* v. *Fowler*, 33 Bea. 616; *Hoare* v. *Osborne*, L. R. 1 Eq. 585; *Re Rigley's Trusts*, 36 L. J. Ch. 147; *Toole* v. *Hamilton*, [1901] 1 Ir. R. 385. If the tomb is part of the fabric of a church the gift is charitable, and therefore good : *ante*, p. 211.

(*d*) *Re Gassiot*, 70 L. J. Ch. 242.

society, or institution (*e*), or for the encouragement of sport (*f*), or for the holiday expenses of the workpeople employed by a company (*g*), is invalid.

Doctrine of *Cocks* v. *Manners*.

If property is so given to a society or institution that the members can immediately dispose of it, then the objection of perpetuity does not arise, and the gift is valid (*h*), even where the testator adds directions as to the mode of application (*i*). But if the intention of the testator is that the property, although given absolutely to the society, shall be held and administered for the benefit of the future as well as the present members, the gift is a perpetuity, and void (*k*). The difficulty in many cases is to decide whether the testator means to benefit the present members of the society as individuals, or to benefit the society as a quasi-corporation (*l*). An unlimited gift of the income of property to a society does not amount to the gift of the corpus, but shows an intention that it is given for the benefit of future members; such a gift is therefore void (*m*).

Whether "trust" without *cestui que trust* can be made valid by restriction as to time

It seems that a trust for the maintenance of a tomb or monument to the memory of the testator or his family, if restricted to the period of lives in being and twenty-one years afterwards, is valid (*n*). And if there is a clause of forfeiture and a gift over in the event of non-performance of the trust, this is effectual (*o*). Whether this exception to the general rule also obtains in the case of other trusts without a *cestui que trust* who can enforce them, does not seem to have been decided.

Trusts for animals.

In *Re Dean* (*p*), it was held that a trust for the benefit of a number of animals and the survivor of them was not bad on the score of its tending to a perpetuity, but the decision is clearly

(*e*) *Thomson* v. *Shakespear*, 1 D. F. & J. 399; *Carne* v. *Long*, 2 D. F. & J. 75; *Re Clark's Trust*, 1 Ch. D. 497; *Re Dutton*, 4 Ex. D. 54; *Re Good*, [1905] 2 Ch. 60 (old officers of a regiment); *Re Swain*, 99 L. T. 604; *Hoare* v. *Hoare*, 56 L. T. 147 (deed).

(*f*) *Re Nottage*, [1895] 2 Ch. 649.

(*g*) *Re Drummond*, [1914] 2 Ch. 90.

(*h*) *Cocks* v. *Manners*, L. R. 12 Eq. 574; *Re Clarke*, [1901] 2 Ch. 110; *Langham* v. *Peterson*, 87 L. T. 744 (gift for "the benefit or hospitality" of two ancient companies). See *Brown* v. *Dale*, 9 Ch. D. 78; *Re Delaney's Estate*, 9 L. R. Ir. 227; *Bradshaw* v. *Jackman*, 21 L. R. Ir. 12.

(*i*) *Re Wilkinson's Trusts*, 19 L. R. Ir. 531.

(*k*) *Re Clifford*, 106 L. T. 14 (angling society); *Re Amos*, [1891] 3 Ch. 159. In that case the devise was void on the further ground that the society, being a trade-union, had no power to acquire land except by purchase for money.

(*l*) See *Morrow* v. *M'Conville*, 11 L. R. Ir. 236, where the earlier cases, including *Hogan* v. *Byrne*, 13 Ir. C. L, 166, and *Stewart* v. *Green*, Ir. R. 5 Eq. 470, are examined; *Bradshaw* v. *Jackman*, 21 L. R. Ir. 12.

(*m*) *Re Swain*, 99 L. T. 604.

(*n*) See *Re Dean*, 41 Ch. D. 552; *Pirbright* v. *Salwey*, [1896] W. N. 86. This doctrine is anomalous and not easy to explain. The question is referred to in Chap. XXIV, *post*, p. 876.

(*o*) *Lloyd* v. *Lloyd*, 2 Sim. (N.S.) 255. Compare the analogous case of a gift to a charity on a similar condition, *post*, p. 280.

(*p*) 41 Ch. D. 552.

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erroneous, if and so far as it is based on the theory that any animal, other than a human being, can be a "life" within the meaning of the modern Rule against Perpetuities, or any other rule of law or equity (*q*).

Charitable gifts.

Charitable gifts are an exception to the rule which forbids the creation of perpetuities, in the primary sense of the word (*r*). Consequently, if there is an absolute immediate gift for a charitable purpose which may last for ever, the gift is good (*s*). And this is so, even although the mode in which the property is to be applied depends on a future and uncertain event; thus where a testator declares his intention of devoting a fund to charity, and directs that when and so soon as land is available for building almshouses, the money shall be employed for that purpose, this is a good charitable gift, although land may never be available for the purpose (*t*). And on the theory that when property has once been taken out of commerce by being devoted to charity, it is immaterial to what particular kind of charity it is devoted, the rule has been established that property may be given to charity A, with a gift over, in an event which may never happen, to charity B (*u*). But if a gift to charity is future or conditional, and may not take effect within the period allowed by the Rule against Remoteness (the modern Rule against Perpetuities) the gift is void (*x*).

Christ's Hospital v. *Grainger.*

Conditional gift to charity.

The exemption of charitable gifts from the rule forbidding the creation of perpetuities makes it possible to create indirectly a perpetuity for non-charitable purposes. Thus, if a testator gives a fund to the trustees of charity A, subject to a condition that they shall keep his family vault in good repair, with a proviso that on failure to comply with the condition the fund is to go to charity B, the condition and gift over are good (*y*). So a bequest to a charitable society, on condition that the committee of the society undertake in writing to the testator's executors to keep his tomb in repair, is good (*z*).

(*q*) See the remarks of Mr. J. C. Gray on this case in Harvard Law Review, xv, 521 *seq.* (reprinted in the second edition of Gray on Perpetuities, § 905, *seq.*), and an article by C. Sweet in the Juridical Review for July, 1906.

(*r*) See the cases cited above, p. 197, n. (*m*); *Att.-Gen.* v. *Webster*, L. R. 20 Eq. 483; *Goodman* v. *Mayor of Saltash*, 7 A. C., at pp. 650, 662.

(*s*) See *ante*, p. 197.

(*t*) *Chamberlayne* v. *Brockett*, L. R. 8 Ch. 206; *Re Gyde*, 79 L. T. 261; *Re Swain*, [1905] 1 Ch. 669; *Wallis* v. *Sol.-Gen. for New Zealand*, [1903] A. C. 173. On this subject see Chap. XIV of the second edition of Tyssen's Charitable Bequests.

(*u*) *Christ's Hospital* v. *Grainger*, 1 Mac. & G. 460, *post*, p. 342.

(*x*) *Post*, p. 342.

(*y*) *Re Tyler*, [1891] 3 Ch. 252. On this case see Mr. C. Sweet's article in the Juridical Review for July, 1906.

(*z*) *Roche* v. *M'Dermott*, [1901] 1 Ir. R. 394.

Re Davies.

In *Re Davies* (*a*), the testator gave £50 to the vicar of C. and his successors to be invested in trust security, and committed to their care and charge certain graves in the churchyard of C., "the same to be kept in good order and repair," with a gift over of the trust fund "if the said vicar and his successors shall at any time fail to comply with these directions," to the superannuation fund of the Cardiganshire Constabulary. Neville, J., held that the gift of the income of the £50 to the vicar and his successors was good; that the police pension fund was not sufficiently described as the object of the gift over, but that if it had been that fund was not wholly a charity, and therefore the gift over on failure to repair the graves was void under the rule against perpetuities.

Re Chardon.

Re Chardon (*b*) is a difficult case and the report in the Law Reports does not state the will sufficiently fully to explain why the Official Trustee of Charity Lands and the Crown were parties. By clause 6 of his will the testator gave his freehold house known as Rapallo House to his trustees upon certain trusts to keep up the same as a museum or picture gallery for the benefit of the public. By clause 8 he gave to his trustees the sum of £200 free of duty upon trust to invest the same and pay the income to the South Metropolitan Cemetery Co., West Norwood, during such period as they should continue to maintain and keep the graves of his great grandfather and Priscilla Navone in the said cemetery in good order and condition with flowers and plants thereon as the same had hitherto been kept by him and declared that the receipt of the said company should be a sufficient discharge for the said income, and declared that if the said grave should not be kept in the order and condition thereinbefore specified, then his trustees should pay and appoint the said income to the charitable orphanage mentioned in clause 10 of his will. By clause 10 the income of his residuary estate was to be applied for the upkeep of Rapallo House and the balance of the income was to be paid to such existing charitable organisations for the benefit of poor and needy artists, sculptors, authors, actors, musicians, and their dependants as his trustees should think best. The will was not enrolled in the books of the Charity Commission within six months of the testator's death, so that section 6 of the Mortmain and Charitable Uses Act, 1888, did not apply (although Rapallo House and grounds did not exceed two acres), and by virtue of section 6 of the Mortmain and Charitable Uses Act, 1891, the

(*a*) [1915] 1 Ch. 543.

(*b*) [1928] 1 Ch. 464. Through the courtesy of the Treasury Solicitor I have been able to see a full copy of the will and other papers in the case: See the Appendix to the 5th edition of Tudor on Charities.

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legal estate vested in the Official Trustee of Charity Lands (*c*). The Court held that "orphanage" in clause 8 of the will should be read "organisations." It will be noticed that the gift to the cemetery company was not charitable, that the gift over was not residue in the sense that the effect would have been the same if it had been omitted (*d*), because if the residuary estate had not been sufficient to keep up Rapallo House, an accretion to residue would have been for the benefit of Rapallo House and not for that of the charitable organisations. The facts of the case can be distinguished from *Re Davies* (*e*) as the gift over was to charity; but it is not so easy to distinguish it from *Commissioners of Charitable Donations* v. *de Clifford* (*f*).

Observation on *Re Chardon.*

The actual decision in *Re Chardon* was that all the interests created were vested and that being so the trusts did not offend the Rule against Perpetuities. But with diffidence it is submitted that the gift over to the charitable organisations was contingent, because it might never come into existence; it was subject to a condition precedent (the non-keeping up of the graves) which might never be satisfied. It is not analogous to the case of an interest vested subject to the life interest of an unborn person, because in such case the prior interest must cease at some time and the rule against remoteness does not require interests to be vested *in possession*, but the rule does require the interests to be vested—that is not subject to a condition precedent. If *Re Chardon* is correct, money might be left to trustees to pay the income to a bank so long as the bank paid a sum equal to such income (less say £100 p.a.) to the Earl of X. for the time being with a gift over on the bank ceasing to make the payment. This in effect would provide for the Earl of X. so long as the earldom existed. It should be noticed, however, that there would be no trust in favour of the earl for the time being which he could enforce.

Municipal corporations.

Many old municipal corporations hold property for the benefit of their freemen or members; these are not charitable trusts, but any question as to their origin or legality has been obviated by section 2 of the Municipal Corporations Act, 1835 (*g*).

According to the older authorities, wherever property is presently vested in A, subject to a right or interest presently

(*c*) Counsel for the Official Trustee argued that the gift to the cemetery company was void for perpetuity.

(*d*) As in *Re Randell*, 38 Ch. D. 213, and *Re Blunt's Trusts*, [1904] 2 Ch. 767. See also *Re Bowers*, [1893] 2 Ch. 491.

(*e*) [1915] 1 Ch. 543.

(*f*) 1 D. & War. 245.

(*g*) *Prestney* v. *Mayor of Colchester*, 21 Ch. D. 111.

Whether a vested alienable interest can constitute a perpetuity.

vested in B, although that right or interest may not take effect in possession until the happening of an event which need not necessarily happen within a definite period, this does not constitute a perpetuity, because B can at any time release his contingent interest, or A can at any time sell the property subject to B's interest, or A and B together can at any time concur in disposing of the property (*b*). But this doctrine has been practically overruled by the *dicta* of the Court of Appeal in *London & S. W. Ry.* v. *Gomm* (*c*), to the effect that an option of purchase in respect of land is invalid unless its exercise is restricted to the period allowed by the modern Rule against Perpetuities.

Attempts to create unbarrable entails.

Clause of perpetuity.

II.—The Old Rule against Perpetuities.—After estates tail were held to be barrable by common recovery, numerous attempts were made by landowners to create unbarrable entails by indirect means. One device was to insert in a settlement of land a proviso imposing a forfeiture or penalty on any tenant in tail who attempted to bar the entail; these provisoes (called clauses of perpetuity) were held to be void (*d*), and in *Mildmay's Case* (*e*), where a similar question arose, the Judges resolved "that all these perpetuities were against the reason and policy of the common law; for at common law all inheritances were fee simple, as Littleton saith . . . But the true policy and rule of the common law in this point was, in effect, overthrown by the statute De Donis Conditionalibus, made *anno* 13 Edw. 1, which established a general perpetuity by act of parliament, for all who had or would make it, by force whereof all the possessions of England in effect were entailed accordingly . . . and the same continued . . . till about the 12th year of Edw. 4, when the Judges on consultation had amongst themselves, resolved that an estate tail might be docked and barred by a common recovery." Lord Bacon describes a perpetuity in the

(*b*) *Gilbertson* v. *Richards*, 4 H. & N. 277, 5 H. & N. 459; *Birmingham Canal Company* v. *Cartwright*, 11 Ch. D. 421; *Avern* v. *Lloyd*, L. R. 5 Eq. 383.

(*c*) 20 Ch. D. 562. In that case the option was contingent and not vested, being exercisable only in an event which might not happen within the limits allowed by the modern Rule against Perpetuities: it was therefore clearly void for remoteness, and the statements of the learned Judges as to the validity of a vested option of purchase, exercisable immediately are merely *dicta*. But the doctrine may be considered settled, as the principle laid down in *L. & S. W. Ry.* v. *Gomm* has been accepted without question for many years. See *Woodall* v. *Clifton*, [1905] 2 Ch. 257; *Edwards* v. *Edwards*, [1909] A. C. 275.

(*d*) *Corbet's Case*, 1 Rep. 83b. Compare the somewhat similar device of giving trustees a power of revocation on the birth of every tenant in tail *ad infinitum*, described by the Real Property Commissioners, Third Rep., p. 30.

(*e*) 6 Rep. 40a.

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same way: "There is start up a device called perpetuity, which is an entail with a proviso conditional, tied to his estate, not to put away the land from his next heir, and if he do, to forfeit his own estate" (*f*). Another device was to create what was called a perpetual freehold, by limiting successive estates for life to the heirs or unborn issue of a person *ad infinitum*; this device also failed, for it was held that if a feoffment was made to the use of A for life, and after to the use of every person that shall be his heir one after another for the term of the life of every such heir, "this limitation is merely void, for the limitation of an use to have a perpetual freehold is not agreeable with the rule of law in estates in possession" (*g*). The rule is stated in the same way in a standard work: "Uses that are against the rules of the common law shall not be executed by this statute [the Statute of Uses], and, therefore, if a feoffment be made to the use of A for life, and after to the use of every person that shall be his heir one after another for term of his life . . . these uses shall not be executed, because these limitations are wholly void" (*h*). "It is against the rules of the common law that a perpetual freehold for life only should descend, because it creates a perpetuity" (*i*). A third device was to create a species of estate tail by means of an executory bequest of a term of years to a person and his heirs one after another *ad infinitum*, either directly or by way of trust; if such a limitation had been held legal it would have created a "perpetuity," because it could not be barred by a common recovery (*k*). Accordingly this device also failed (*l*), for the reason stated in *Lampet's Case*: "It would be inconvenient that such manner of perpetuity should be made of a chattel, when of an inheritance neither by act executed by the common

Perpetual freehold.

Executory bequest of a term.

(*f*) Bacon Law Tracts, 145; *Duke of Marlborough* v. *Godolphin*, 1 Eden, 404; *Mainwaring* v. *Baxter*, 5 Ves. 458.

(*g*) *Chudleigh's Case*, 1 Rep. 138a. The general principle is recognised in *Re Parry and Daggs*, 31 Ch. D. 130.

(*h*) Shepp. Touch. 506. "Attention was drawn to this passage and to the passage cited above from *Chudleigh's Case* in an article of mine on Perpetuities in the Law Quar. Review (xv, 71). In the second edition of his book on Perpetuities, Mr. Gray has done me the honour of referring to my article, but his comments on it are, if I may say so, in the nature of special pleading, for they evade the real question, which is—Was there a rule of the common law which forbade the limitation of successive life estates to the unborn descendants or heirs of a person *ad infinitum*? The Real Property Commissioners (Third Report, pp. 30, 31) say that there was, and this conclusion is, it is submitted, superabundantly justified by the authorities cited in the text" [Note by C. Sweet].

(*i*) Gilbert, Uses, 77. See also the passages cited from *Humberston* v. *Humberston*, *post*, p. 259.

(*k*) *Grig* v. *Hopkins*, Sid. 37.

(*l*) *Sanders* v. *Cornish*, Cro. Car. 230; *Backhouse* v. *Bellingham*, Pollexf. 33; *Wood* v. *Saunders*, *ibid.* 35.

law, nor by limitation of an use, nor by devises in last wills, any perpetuity can be established" (*m*).

Technical meaning of "perpetuity."

Hence "perpetuity" came to have the special meaning of a limitation equivalent to, or in the nature of, an unbarrable entail. "A perpetuity is the settlement of an estate or an interest in tail, with such remainders expectant upon it as are in no sort in the power of the tenant in tail in possession to dock by any recovery or assignment" (*n*). "A perpetuity is where an estate is so designed to be settled in tail, etc., that it cannot be undone or made void" (*o*). "A perpetuity is the settlement of an interest descendable from heir to heir, so that it shall not be in the power of him in whom it is vested to dispose of it, or turn it out of the channel" (*p*).

It is necessary to dwell on this use of "perpetuity," because the meaning of the word has so completely changed that its use in this sense by Mr. Fearne and the Judges and writers of the eighteenth century, and even later (*q*), is liable to cause misapprehension (*r*). The doctrine of *cy-près* is unintelligible, unless it is recognised as an indulgence granted to a testator who attempts to create an unbarrable entail (*s*).

Partial perpetuity.

An attempt to create an unbarrable entail is ineffectual, even if it is restricted to a certain number of generations. This was the case in *Seaward* v. *Willock* (*t*), where the testator devised land to A for life, and to his descendants down to the tenth generation during their lives (*u*).

Perpetuity by terms of years.

The law does not allow a "perpetuity" to be created by means of terms of years. This was attempted by the testators

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(*m*) 10 Co. 52a. Compare *Mainwaring* v. *Baxter*, *post*, p. 256.

(*n*) *Per* Lord Nottingham, *Duke of Norfolk's Case* (1681), 3 Cha. Ca. 1.

(*o*) Jacob, Law Dict. 1739. The definition in Les Termes de la Ley, 1721, is in the same terms.

(*p*) Gilbert; Uses, 118.

(*q*) See Shepp. Touch. by Preston (1820), p. 506; Preston, Abstr. ii, 148, *Duke of Marlborough* v. *Godolphin*, cited *post*, p. 257; *Monypenny* v. *Dering* (1847), 16 M. & W., at p. 428.

(*r*) Even Mr. Jarman did not fully grasp the change in the meaning of the word. "The early judges," he says, "had an extreme repugnance to every disposition of property that savoured of a perpetuity, but the expressions which occasionally fell from them, demonstrative of this feeling, did not afford a specific definition of the monster which the law was stated to 'abhor'" (1st ed., p. 220). If Mr. Jarman had referred to the cases cited above, and to *Grig* v. *Hopkins* (Sid. 37), he would have found that there was no ambiguity in the term "perpetuity" as used by the early Judges. It is still more surprising to find so learned and accurate a writer as Mr. Gray misled by the change in the meaning of the term. He entirely misunderstands the case of *Humberston* v. *Humberston*, owing to his unwillingness to admit that in 1717 "perpetuity" still retained its meaning of a limitation in the nature of an unbarrable entail (Gray, Perp., s. 193, 2nd ed.).

(*s*) *Post*, p. 258.

(*t*) 5 East, 198.

(*u*) The case is referred to below, p. 261

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in *Somerville* v. *Lethbridge* (*x*) and *Beard* v. *Westcott* (*y*), in each of which cases successive terms of ninety-nine years, determinable on their lives, were given to the sons of A, a bachelor, and their issue male, and in default of such issue to B, a living person : it was held that all the limitations after the life estate given to A's first son (who was unborn at the testator's death) were void as tending to a perpetuity (*z*).

Perpetuities not allowed in equity.

A "perpetuity" cannot be created by means of a trust. "If in equity you could come nearer to a perpetuity than the rules of common law would admit, all men, being desirous to continue their estates in their families, would settle their estates by way of trust, which might indeed make well for the jurisdiction of Chancery, but would be destructive to the commonwealth" (*a*). Attempts to make entails practically unbarrable by limiting long terms of years to trustees, and giving them powers of entry and raising money, etc., seem at one time to have been not uncommon, but every attempt of this kind was held void, as tending to a perpetuity (*b*). So if a testator devises land to A B in tail "upon special trust and confidence" that he will not bar the entail, this provision is wholly ineffectual (*c*).

Every entail is barrable.

The general rule of law on the subject was thus stated by James, L.J. : "If there is one thing that has been settled beyond all question in the real property law of this country, it is that no condition, no restriction, no prohibition, no limitation over, can prevent a tenant in tail from suffering a common recovery with all its consequences" (*d*).

Foreign entail.

In *Fordyce* v. *Bridges* (*e*), a testator bequeathed personal estate upon trusts which might result in its being invested in the purchase of land in Scotland to be settled in strict entail, according to the law of that country, which apparently did not allow such estates to be barred, and it was objected that this would create a perpetuity according to English law, and was therefore void. It was, however, held by Lord Cottenham that "the rules acted upon by the Courts in this country with respect to testamentary dispositions tending to perpetuities, relate to this country only."

(*x*) 6 T. R. 213, but badly reported. See Sugden's note to Gilbert on Tenures, 269.

(*y*) 5 B. & Ald. 801.

(*z*) See further as to these cases, *post*, pp. 261 and 328.

(*a*) *Duke of Norfolk* v. *Howard*, 1 Vern. 164.

(*b*) See *Mainwaring* v. *Baxter*, 5 Ves. 458; *Case* v. *Drosier*, 2 Keen, 764, *post*, p. 297, and *Sykes* v. *Sykes*, L. R. 13 Eq. 56, referred to below, p. 287; *Floyer* v. *Bankes*, L. R. 8 Eq. 115, *post*, p. 287.

(*c*) *Dawkins* v. *Lord Penrhyn*, 4 A. C. 51.

(*d*) *Dawkins* v. *Lord Penrhyn*, 6 Ch. D., at p. 326; cited with approval *S. C.* in D. P. 4 A. C. 51.

(*e*) 2 Ph. 497.

Whitby v. *Mitchell.*

III.—The Rule in Whitby v. Mitchell before 1926.—In *Whitby* v. *Mitchell* (*f*), land was limited to an unborn person for life, with remainder to the children of that unborn person: it was held by Kay, J., and by the Court of Appeal, that the remainder to the children was bad. Some of the authorities—*Hay* v. *Earl of Coventry* (*g*), *Monypenny* v. *Dering* (*h*), and the opinions of Mr. Charles Butler and Mr. Joshua Williams—are referred to in the judgments, but still earlier and more instructive authority is to be found. Mr. Fearne, in 1776, explained the rule thus: "Any limitation in future, or by way of remainder, of lands of inheritance, which in its nature tends to a perpetuity (*i*), even although there be a preceding vested freehold, so as to take it out of the description of an executory devise, is by our Courts considered as void in its creation; as in the case of a limitation of lands in succession, first to a person *in esse*, and after his decease to his unborn children, and afterwards the children of such unborn children, this last remainder is absolutely void" (*k*).

Mr. Fearne's statement of the rule.

Again, in 1759, in *Duke of Marlborough* v. *Godolphin* (*l*), where the testator devised lands to several persons successively for life, with remainder to their sons successively in tail male, and directed his trustees upon the birth of each son, to revoke the uses and to limit the land to such son for life, with remainder to his sons in tail male, it was held that the clause of revocation and resettlement was void, as tending to a perpetuity. Lord Northington pointed out that the law allows land to be tied up by limiting a contingent remainder to an unborn person for life, but does not permit a remainder to his issue.

Marlborough v. *Godolphin.*

The rule in *Whitby* v. *Mitchell* has been described as "the old common law rule against double possibilities which prevents a limitation of a legal estate in land to the unborn child of an unborn child of an existing person" (*m*), but this is an inaccurate description of the rule, which is directed against limitations to two unborn generations in succession (*n*). Such a limitation as that referred to in the passage just cited is not invalid under the rule in *Whitby* v. *Mitchell*. For example, a limitation of land to A for life, and after his death to the eldest grandchild of B, a bachelor, is perfectly good.

Erroneous statement of rule.

(*f*) 42 Ch. D. 494; 44 Ch. D. 85.

(*g*) (1789), 3 T. R. 86.

(*h*) 2 D. M. & G., at p. 170.

(*i*) As to the meaning of "perpetuity" in this passage, see *ante*, p. 255.

(*k*) Fearne, Cont. Rem. (10th ed.), 502. See also Preston, Abstr. ii, 114.

(*l*) 1 Eden, 404. The law is laid down in similar terms by the Court of Exchequer in *Monypenny* v. *Dering*, 16 Mee. & W. 418.

(*m*) Farwell on Powers, 286. In the third edition the words "against double possibilities" are omitted.

(*n*) See *Re Nash*, [1910] 1 Ch. 1, and an article by C. Sweet in the L. Q. R., October, 1909.

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Rule did not apply to personalty.

The rule in *Whitby* v. *Mitchell* did not apply to limitations of personal estate (*o*).

The rule in *Whitby* v. *Mitchell* before 1926.

The rule has been abolished by the recent legislation (*p*). It was well established (*q*); it applied to equitable as well as legal remainders (*r*), and to remainders appointed in exercise of a special power (*s*). If the children are defined as the children of a born person the fact that the other parent might be unborn did not attract the rule (*t*).

Rule abolished after 1925.

Section 161, sub-section 1 of the Law of Property Act, 1925, which only applies to limitations or trusts created by an instrument coming into operation after 1925, enacts that: "The rule of law prohibiting the limitation, after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person is hereby abolished but without prejudice to any other rules relating to perpetuities." This section abolishes the rule in *Whitby* v. *Mitchell* in the case of wills coming into operation after 1925, although the marginal note is "abolition of the double possibility rule" (*u*). The words "any other rules relating to perpetuities" no doubt refer to the rule against remoteness established in *Cadell* v. *Palmer* (*x*), and possibly to the rule based on *Re Frost* (*y*).

How far intention to create a "perpetuity" was carried into effect before 1926.

IV.—The Doctrine of Cy-près before 1926.—Although the law does not allow a testator to devise land to successive unborn generations as purchasers, the Courts have, in certain cases, endeavoured to carry out his intention by giving effect to the devise within the limits allowed by law. This is the doctrine of *cy-près*, or approximation, under which the limitation to the unborn descendants is converted into an estate tail (*z*). Thus,

(*o*) *Re Bowles*, [1902] 2 Ch. 650.

(*p*) Since the rule is now abolished I have omitted part of this section including a valuable note by Mr. C. Sweet on the origin of the rule. In the last edition Mr. Sweet said that the rule did not apply to executory devises, but he changed his view later (27 L. Q. R. 171).

(*q*) *Re Clarke's Settlement Trust*, [1916] 1 Ch. 467.

(*r*) *Monypenny* v. *Dering*, 2 D. M. & G. 145; *Re Nash*, [1910] 1 Ch. 1.

(*s*) *Re Nash, supra.*

(*t*) *Re Bullock's Will Trusts*, [1915] 1 Ch. 493; *Re Garnham*, [1916] 2 Ch. 413; not following *Re Park's Settlement*, [1914] 1 Ch. 595.

(*u*) See *ante*, p. 257.

(*x*) 1 Cl. & Fin. 372.

(*y*) 43 Ch. D. 246. See an article by C. Sweet in 27 L. Q. R., p. 50.

(*z*) Mr. Lewis treats the doctrine of *cy-près* as an exception to the modern Rule against Perpetuities (Perp. Supp. 142), but this is an error, arising from Mr. Lewis's inability to understand the meaning of "perpetuity" as used by Judges and writers in the seventeenth and eighteenth centuries (*ante*, p. 255). No doctrine of *cy-près* has ever been engrafted on the modern Rule against Perpetuities; that Rule is unflinchingly applied without regard to the intention of the testator, and the fact that its application in a given case will defeat the testator's expressed intention, is not allowed to affect the construction of the will, unless the language of the will is ambiguous, so as to be capable of a construction which will carry out, and not defeat, the intention of the testator (*post*, p. 340).

Humberston v. *Humberston.*

in *Humberston* v. *Humberston* (*a*), a testator devised lands to a corporation upon trust to convey them to M. Humberston for life, and after his death to his first son for life, and so to the first son of that first son for life, etc., with similar elaborate limitations by way of executory trust to a large number of persons : " both Court and counsel held that to be such an affectation and tendency to a perpetuity that nothing was said in support of it," and Lord Chancellor Cowper gave judgment as follows :—" Though an attempt to make a perpetuity for successive lives be vain, yet so far as it is consistent with the rules of law it ought to be complied with; and, therefore, let all the sons of these several Humberstons, that are already born, take estates for their lives; but where the limitation is to the first son unborn, there the limitation to such unborn son shall be in tail male " (*b*). It was at one time supposed that the ground for this decision was that, the trust being executory, " the Court was authorised to mould the limitations so as to bring them within the established limits, independently of the doctrine in question " (*c*). But this is not strictly accurate, for the doctrine of *cy-près* is based on the presumed intention of the testator (*d*). In the case of an executory trust, however, greater latitude is allowed in moulding the limitations in order to carry out the intention of the testator than where he has been his own conveyancer (*e*).

Doctrine not restricted to executory trusts.

Being an anomaly, the doctrine of *cy-près* ought not to be extended (*f*).

Doctrine not to be extended.

In all these cases where successive life estates are given to A and his issue, A takes a life estate, and his first descendant in the line of succession takes an estate tail (*g*). There are cases,

Who takes estate tail.

(*a*) 1 P. W. 332; *S.C.*, *s. n. Humerston* v. *Humerston*, 1 Gilb. 128; *Re Hobbs*, [1917] 1 Ch. 569.

(*b*) 1 P. W. 332.

(*c*) Mr. Jarman, in the first edition of this work, 261, n. (*t*). See *Mortimer* v. *West*, 2 Sim. 274, referred to *post*, note (*i*); *Williams* v. *Teale*, 6 Ha. 239.

(*d*) *Parfitt* v. *Hember*, L. R. 4 Eq. 443; *Hampton* v. *Holman*, 5 Ch. D. 190, where Jessel, M.R., pointed out that *Monypenny* v. *Dering* (16 M. & W. 418) was a clear decision to the effect stated in *Parfitt* v. *Hember*. See also *Forsbrook* v. *Forsbrook*, L. R. 3 Ch. 99.

(*e*) *Re Mortimer*, [1905] 2 Ch. 502. Compare *Miles* v. *Harford*, 12 Ch. D. 691, *post*, p. 281.

(*f*) *Re Mortimer*, *supra*. In *Re Dennehy's Estate* (17 Ir. Ch. 97) the Court refused to apply the doctrine to a will under which the appointees were put to their election : *sed quære*.

(*g*) In *Forsbrook* v. *Forsbrook*, L. R. 3 Ch. 99, where successive life estates were given to the testator's two nephews and their male issue, there was a direction that " each two of the succeeding inheritors " should inherit free from incumbrances, and this appears to have prevented the application of the *cy-près* doctrine; it was held that the nephews took life estates, with remainder to their eldest sons for their lives, with remainder to the nephews in tail male : the eldest sons were living at the testator's death. The L.JJ. followed the doctrine laid down in *Doe* v. *Gallini*, 3 Ad. & E. 340. As to

apparently similar to these, where the estate tail is given to A (*h*), but the explanation seems to be that in the latter class of cases the effect of the will is to give A an estate of inheritance, and the words which purport to give him and his issue estates for life are either taken to be words descriptive of an estate of inheritance, or they give A an estate of inheritance coupled with a proviso that the successive tenants shall hold for life; consequently A takes an estate tail, not by *cy-près*, but by rejecting the words which are repugnant to an estate of inheritance (*i*).

Devise of successive life estates to "issue."

In *Parfitt* v. *Hember* (*k*), the testator devised real estate upon trust for his brother A for life, with remainder in trust for his nephews and niece B, C, and D, and the survivor, for their lives and the life of the survivor, and for the issue of them respectively for their lives for ever, as tenants in common, with a gift over on their death without issue, or in case of the death of all their issue, and directed that "the before-stated entails to my nephews and niece and their respective issue" should be equally divided "amongst the daughters as well as the sons of them, my nephews and niece, and their issue." It was held by Romilly, M.R., that all the children of B, C, and D took equitable estates as tenants in common in tail, with cross remainders.

In *Re Richardson* (*l*), the testator devised land to his three children by name, and directed that if any of them should die leaving issue, his share should go to his children for life in equal shares, "and so to be continued and distributed in a descending line *per stirpes* from issue to issue for life"; there was no gift over in default of issue. It was held by Buckley, J., that the *cy-près* doctrine did not apply, on the ground that the persons to benefit under the devise were a class larger than those who would take under an estate tail. The limitations were such that in passing from generation to generation it was not the heir in tail who was to take, but the heir in tail and all his brothers and

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the remark of Rolt, L.J., on the application of the doctrine of *cy-près*, see Gray, §§ 658 *et seq.* Compare *Re Buckton*, [1907] 2 Ch. 406, *post*, p. 1823.

(*h*) *Doe* v. *Stenlake*, 12 East, 515; *Reece* v. *Steel*, 2 Sim. 233; *Hugo* v. *Williams*, L. R. 14 Eq. 224; *Trash* v. *Wood*, 4 My. & Cr. 324; *Brooke* v. *Turner*, 2 Bing. (N.C.) 422; *Re Mountgarret*, [1919] 2 Ch. 294, and other cases referred to in Chap. XVII, *post*, p. 551.

(*i*) Gray on Perp., § 656. In *Mortimer* v. *West*, 2 Sim. 274, a devise to A, B, and C for their lives, with remainder to their respective children for life, and so to be continued from issue to issue for life, with gifts over in default of issue, was held to give A, B, and C estates tail. The V.-C. refused to adopt the doctrine of *cy-près* applied in *Humberston* v. *Humberston*, because in the case before him the devise was direct and not by way of executory trust: but this was erroneous: *ante*, p. 259. As to the decision in *Wollen* v. *Andrewes*, 2 Bing. 126, see Gray, § 657.

(*k*) L. R. 4 Eq. 443. See *Hampton* v. *Holman*, 5 Ch. D. 183.

(*l*) [1904] 1 Ch. 332.

sisters. "That is a direction hopelessly inconsistent with an estate tail" (*m*).

Doctrine not applied where no general intent to create estate tail,

The doctrine is not applied where there is no general intent to create an estate tail. Thus, in *Seaward* v. *Willock* (*n*), the testator devised land to A for life "and after him to his eldest or any other son after him for life, and after them to as many of his descendants issue male as shall be heirs of his or their bodies, down to the tenth generation during their natural lives": as this limitation was not to the descendants of A *ad infinitum*, it was held that A took an estate for life only.

nor to terms of years.

Nor is it applied where successive terms of years, determinable on death, are given to unborn issue (*o*).

Gift to unborn person for life, with remainder to issue in tail.

In a case where land was directed to be purchased and settled on a person and his descendants for successive life estates (such person to be ascertained on the failure of a previous estate tail), and the person so to be ascertained was not born at the death of the testator, it was held that the trust could not be executed (*p*). The case of *Humberston* v. *Humberston* was cited in argument, but the doctrine of *cy-près* was not referred to in the judgments.

The case in which the question of the application of the doctrine most frequently arises is where an estate tail is expressly given. The doctrine of *cy-près*, as Mr. Jarman explains (*q*), "applies where lands are limited to an unborn person for life, with remainder to his first and other sons successively in tail, in which case, as such limitations are clearly incapable of taking effect in the manner intended (the remainder to the issue being, as we have seen, absolutely void), the doctrine

(*m*) The learned Judge thought that *Parfitt* v. *Hember* was distinguishable, and that the decision in *Humberston* v. *Humberston* turned on the fact that the trusts were executory. But it is clear that the general rule laid down in *Humberston* v. *Humberston* applies to direct devises as well as to executory trusts (*supra*, note (*d*)), and in *Parfitt* v. *Hember* the key-note of the judgment is to be found in the opening sentence: "I think that in this will an intention is shown to give a series of life estates in perpetuity to the issue of the nephews and niece." *Parfitt* v. *Hember* was referred to with approval by Jessel, M.R., in *Hampton* v. *Holman*, 5 Ch. D. 183. The test is whether the estate, if left to itself, so as to go in the precise course marked out by the testator, will devolve as an estate tail; if so, the doctrine of *cy-près* is applicable: see *Monypenny* v. *Dering*, 16 M. & W., at p. 428. See also Gray, Perp., § 652.

(*n*) 5 East, 198.

(*o*) *Beard* v. *Westcott*, 5 Taunt. 393; 5 B. & Ald. 801; T. & R. 25; *Somerville* v. *Lethbridge*, 6 T. R. 213. In the first edition of this work (p. 263) Mr. Jarman said on the authority of the three cases last cited: "It has been decided in relation to the doctrine in question . . . that it is inapplicable where an attempt is simply made to limit a succession of life estates to the issue of an unborn person, either for a definite or indefinite series of generations." It will be seen that the cases in question are not authorities for this proposition.

(*p*) *Tregonwell* v. *Sydenham*, 3 Dow, 194, "a case of extraordinary difficulty" (Gray, Perp., § 419). See Marsden, Perp. 136.

(*q*) First edition, p. 260.

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in question gives to the parent the estate tail that was designed for the issue; which estate tail (unless barred by the parent or his issue being tenant in tail for the time being) will comprise, in its devolution by descent, all the persons intended to have been made tenants in tail by purchase. The intention that the testator's bounty shall flow to the issue, is considered as the main and paramount design, to which the mere mode of their taking is subordinate and the latter is therefore sacrificed (*r*). The first clear authority (*s*) for the doctrine is *Nicholl* v. *Nicholl* (*t*), where the devise was 'to the second son of W. Nicholl (who at the death of the testator had no son) *for his life*, and after his death, or in case he should inherit the paternal estate by the death of his elder brother, to *his second son* lawfully to be begotten *and his heirs male*, remainder to the third and other sons of W. Nicholl successively, according to priority of birth, in tail male, remainder over.' The Common Pleas, on a case sent from Chancery, certified that the estate would vest in the second son [when born, of W. Nicholl] by executory devise; and that in order to effectuate the general intention of the testator, he would take *an estate in tail male*, determinable on the accession of the paternal estate.

Nicholl v. *Nicholl.*

"So, in *Robinson* v. *Hardcastle* (*u*), where, on the marriage of A and B, lands were limited to A for life, remainder to such of the children of the marriage as A should appoint, and, in default, over. A by will appointed to his son for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of such son successively in tail male, with remainder to his daughters as tenants in common in tail. Mr. Justice Buller expressed an opinion that the son, by the application of the *cy-près* doctrine, took an estate tail; but the Court was not called upon to decide the point.

"The case, however, which has carried this doctrine farther than any other, is *Pitt* v. *Jackson* (*x*), where, by a settlement

Pitt v. *Jackson.*

(*r*) Mr. Jarman's statement of the ground of the rule will be found confirmed by the Court of Exchequer in *Monypenny* v. *Dering*, 16 Mee. & W., at p. 428, and by Jessel, M.R., in *Hampton* v. *Holman*, 5 Ch. D. 190.

(*s*) After referring to the case *Humberston* v. *Humberston* (*ante*, p. 259), Mr. Jarman remarks: "*Chapman* d. *Oliver* v. *Brown*, 3 Burr. 1626; 3 B. P. C. Toml. 269, cited Butl. Fea. C. R. 207, n., is also distinguishable (though the doctrine was much discussed), as there was an express devise in tail to the unborn son, and the only question was, whether words ought not to be supplied which would have given the estate tail to the son of such son, and thereby rendered the devise void. This was refused, and, consequently, the devise was held to be good."

(*t*) 2 W. Bl. 1159. See *post*, p. 263, n. (*c*).

(*u*) 2 T. R. 241, 380, 781. See also *Parfitt* v. *Hember*, L. R. 4 Eq. 443; *Line* v. *Hall*, 43 L. J. Ch. 107.

(*x*) 2 Br. C. C. 51, cited 2 Ves. jun. 349. See also *Smith* v. *Lord Camelford*, 2 Ves. jun. 698; *Griffith* v. *Harrison*, 4 T. R. 737; and *Stackpoole* v. *Stackpoole*, 4 D. & War. 320, where (as in *Pitt* v. *Jackson*) the doctrine was

on the marriage of P. W., certain moneys were directed to be laid out in the purchase of lands, to be settled to the use of P. W. for life, without impeachment of waste, with remainder to his intended wife for life, remainder to the use of the children of the marriage, subject to such powers, limitations, and provisoes as P. W. by deed or will should appoint, with remainders over. By will P. W. appointed trust moneys to be laid out in real estate, to be conveyed in trust for his daughter M., during her life, for her separate use, remainder to trustees to support contingent remainders, remainder *to all and every the child and children of his said daughter, as tenants in common in tail*, with remainders over. Sir Lloyd Kenyon, M.R., declared the appointment to be invalid, and that the whole of the share appointed to the daughter for her separate use was, to effectuate the testator's general intention, to be considered to vest in her an estate tail.

Remarks on *Pitt* v. *Jackson*.

"In this case, the nature of the estate appointed to the children, differed widely from the mode of its devolution under an estate tail, which this doctrine gave to their parent. In all the preceding cases, the first and other sons were to take *successively*; here, all the children, female as well as male, were to take *concurrently*. Probably the authority of *Pitt* v. *Jackson* is not to be implicitly relied on; even the eminent judge who decided it, on a subsequent occasion, admitted that it went to the outside of the rules of construction, adding, however, that still he did not think it was wrong (*y*). Lord Eldon, in quoting this observation (*z*), intimated that it was not proper to go one step further; for those cases, in order to serve the general intent and the particular intent, destroyed both." However, *Pitt* v. *Jackson* was approved by Lord St. Leonards (*a*), and was followed by Sir J. Wigram, V.-C., under precisely similar circumstances, in *Vanderplank* v. *King* (*b*).

Doubted, but confirmed.

The mode of provision may be changed, but no new persons provided for.

But although the mode and form of the provision intended by the will may be altered by the application of this rule of construction, no person or line of persons may be introduced for whom no provision whatever was intended. Therefore, in *Monypenny* v. *Dering* (*c*), it was held by Lord St. Leonards that

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held applicable to a testamentary appointment. As to *Line* v. *Hall*, *supra* (where the devise included land belonging to the testator absolutely), see the remarks of Mr. Gray, Perp., § 648, n.

(*y*) 1 East, 451.

(*z*) 7 Ves. 390.

(*a*) 4 D. & War. 320; 2 D. M. & G. 173. See Sugden on Powers, 500.

(*b*) 3 Hare, 1.

(*c*) 2 D. M. & G. 145; 16 M. & W. 418; stated *post*, p. 330. In *Nicholl* v. *Nicholl*, *ante*, p. 262, the will included none of the descendants of the second son of W. N., except the second son of that second son, and the heirs male of his body: whereas the decision included them all, and among them

the first son of P. M. could not be held to take an estate tail, because such an estate would in regular succession, and after failure of the eldest son and his issue, descend to the second and other sons of such first son, for whom the will made no provision (*d*).

The *cy-près* doctrine may be applied to some only of a class.

In *Vanderplank* v. *King* (*e*), the question arose, whether the *cy-près* doctrine could be applied to some of a class and not to others. The testator devised lands to his daughter (who was living at his decease) for her life, with remainder to all her children (as it was decided) as tenants in common for their lives, with remainder to the grandchildren *per stirpes* in tail, with cross remainders between the grandchildren of each stock, and also (as it was held) between each stock of grandchildren. The testator's daughter had several children living at his death, to whom alone estates for life with remainder to their issue could be legally limited; one child named Matilda was born after the testator's decease, the remainder to whose issue was void, being an attempt to create a perpetuity, and Sir J. Wigram, V.-C., decided that the *cy-près* doctrine was to be applied to the share of Matilda, and that she took an estate tail, but that it was not necessary similarly to modify the estates limited in the shares of the other children; Matilda, in fact, was made to stand in the same position as a single child of hers would have done, under the will and apart from the perpetuity rule, she being dead.

Doctrine of *cy-près* not confined to first set of limitations.

The doctrine in question is not confined to the first set of limitations requiring modification, but is extended to all that follow. Thus, in *Hopkins* v. *Hopkins* (*f*), a testator devised lands in trust for I. H. for life, with remainder to S. H., son of I. H., for life, with remainder to the first and other sons of S. H. successively in tail male, and for want of such issue, in case I. H. should have any other son or sons, then in trust for all and every of such other son and sons respectively and successively for their respective lives, with like remainders to their several sons successively and respectively as were thereinbefore limited to the issue male of the said S. H., with remainders over. S. H. died in the testator's lifetime without issue, and I. H. never had any other son, so that it was necessary to apply the *cy-près* doctrine to the limitations to his other sons for life, with remainder to their issue, the remainder

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of course the first son of the second son of W. N., whose exclusion from the will appears to have been designed. The case is therefore overruled, so far at least as it favours a doctrine contrary to *Monypenny* v. *Dering*. See Gray, Perp., § 647, n.

(*d*) The same principle was followed in *Re Rising*, [1904] 1 Ch. 533, and in *Re Mortimer*, [1905] 2 Ch. 502.

(*e*) 3 Hare, 1. See also *Peyton* v. *Lambert*, 8 Ir. Com. Law Rep. 485

(*f*) Co. Lit. 272a, Butler's note 1, vii, 2, 1 Atk. 581.

to such issue being too remote; and as the remainders over were held good, it is clear that it was considered that not only the second, but the third and every other son of I. H. would, under the doctrine in question, have taken an estate tail.

How far doctrine applies to personalty.

It follows from the nature and history of the doctrine of *cy-près* that it cannot be fully applied to limitations of personal estate (*g*). But the principle of carrying out the general intention of a testator is applied to such cases as far as possible. Thus, in *Mackworth* v. *Hinxman* (*h*), personalty was bequeathed so as to follow a baronetcy, and it was held that, in order to accomplish the testator's intention, the first successor to the title took a quasi-entail, and that the personalty became his absolute property. So in *Re Johnson's Trusts* (*i*), the trustees of a will were directed to pay the income of personal property to the person for the time being entitled to the rents and profits of the freehold hereditaments devised by the same will in strict settlement : it was held that the personal estate vested absolutely in the first tenant in tail.

Mixed fund.

Whether the doctrine applies to a mixed fund does not seem to have been decided (*k*).

It is settled that the doctrine is not applicable where the limitation to the children of the unborn persons gives them an estate in fee simple. This was decided in *Bristow* v. *Warde* (*l*), where money directed to be laid out in land was, by the trusts of certain articles, and a settlement executed in pursuance of those articles, made subject to a power of appointment by the husband, in favour of the children of the marriage; and he appointed portions of the fund to certain of the children for life, and after their decease, among their children, as they should appoint; it was held to be real estate, and that the husband's appointment (which, if valid, would have the effect of vesting absolute interests in the grandchildren equally, in default of appointment by the children), was void as to the grandchildren, and could not, as Lord Loughborough was of opinion, be executed *cy-près* (*m*).

New law. Abolition of doctrine after 1925.

As regards wills coming into operation after 1925 the doctrine,

(*g*) *Routledge* v. *Dorril*, 2 Ves. jun. 365. See *Monkhouse* v. *Monkhouse*, 3 Sim. 119.

(*h*) 2 Kee. 658.

(*i*) L. R. 2 Eq. 716.

(*k*) *Boughton* v. *James*, 1 Coll. 44. See the question discussed in Gray, Perp., § 647, n.

(*l*) 2 Ves. jun. 336; and see *Hale* v. *Pew*, 25 Bea. 335. The doctrine is not applicable to limitations by deed : *Brudenell* v. *Elwes*, 7 Ves. 390; 1 East, 442.

(*m*) See further as to the doctrine of *cy-près*, Sugd. Powers; Fearne, C. R., by Butler; Gray, Perp., § 643.

which did not apply to deeds (*mm*), has been abolished by section 130, sub-section 1 of the Law of Property Act, 1925, which prohibits the creation of estates tail except by words by which before the Act these could have been created by a deed, not being an executory instrument.

Effect of, in making land inalienable.

V.—Executory Limitations on Failure of Issue.—Under executory limitations of this kind, land could formerly be tied up for a longer period than was possible by means of an ordinary entail. Thus, under a devise to A in fee simple, and if he die without issue living at his death then to B in fee simple, and if he die without issue living at his death, then to C in fee simple, and so on, it was impossible for A to dispose of the land without the concurrence of B, C, etc., although under an ordinary strict settlement in tail, A and his eldest son could have barred the entail at any time after the son came of age. In order to prevent this result, the Conveyancing Act, 1882, enacted, section 10 (*n*), that where a person is entitled to land with an executory limitation over on default or failure of all or any of his issue, that executory limitation shall become void and incapable of taking effect as soon as there is living any issue who has attained twenty-one of the class on default or failure of which the limitation over was to take effect (*o*).

Conveyancing Act, 1882, s. 10.

VI.—The Modern Rule against Perpetuities.—The Rule now to be considered is of comparatively recent growth, for although the necessity of imposing some check on the creation of future interests in real and personal property, of a kind unknown to the common law, began to be felt shortly after the modern modes of settling property by means of uses, trusts, and executory devises and bequests were introduced (*p*), it was not until

(*mm*) Gray on Perpetuities (3rd ed.), 508; Theobald on Wills (8th ed.), p. 688.

(*n*) Now replaced and extended by section 134 of the Law of Property Act, 1925.

(*o*) For an example, see *Re Booth*, [1900] 1 Ch. 768; *Re Shrubb*, [1910] W. N. 143 (equitable estate in fee).

(*p*) "It was soon perceived," says Mr. Jarman, "that when increased facilities were given to the alienation of property, and modes of disposition unknown to the common law arose, from the introduction of springing uses and executory devises, which no act of the owner of the preceding estate could defeat, it was necessary to confine the power of creating these interests within such limits as would be adequate to the exigencies of families, without transgressing the bounds prescribed by a sound public policy. This was effected, not by legislative interference, but by the Courts of Judicature, who, in this instance, appear to have trodden very closely on the line which divides the judicial from the legislative functions" (1st edition, p. 220). The origin of the Rule is somewhat obscured by the ambiguity of the word "perpetuity," but there is no doubt that the Rule was originally directed against attempts made to create unbarrable entails by means of executory bequests of terms of years; these being indestructible by common recovery,

1833 that the terms of the Rule were definitely settled (*q*), and even at the present day the precise limits of its scope and application are a matter of doubt.

Rule stated.

(A) THE RULE STATED (*r*).—Subject to the exceptions to be presently mentioned, no contingent or executory interest in property can be validly created, unless it must necessarily vest within the maximum period of one or more lives in being and twenty-one years afterwards. Consequently, a devise or bequest not falling within one of those exceptions, is void if it is to take effect on the happening of an event at some indefinite future time (*s*), or within a fixed period exceeding twenty-one years; for it is not necessary that the period within which the interest is to vest should be limited with reference to a life.

What lives may be taken.

Nor is it necessary that the life or lives specified in the limitation should be those of persons taking an interest in the property (*t*); and the number of lives which the testator is allowed to specify is only limited by the requirement that it must be possible to ascertain who they are, and obtain evidence of their death. It is true that in some of the cases it is laid down that an indefinite number of lives may be taken (*u*), but

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feoffment, or the like, the Courts were at first disposed to hold that any bequest of a term to take effect on the failure of the issue of a given person was bad, as tending to create a perpetuity in the old-fashioned sense of the word (*ante*, p. 255), even if the failure was limited to the period of a life in being (*Child* v. *Baylie*, Cro. Jac. 459; Palm. 333). It was not until the *Duke of Norfolk's Case* (3 Ch. Ca. 1) that the principle expressed by the modern Rule against Perpetuities—that the validity of an executory devise or bequest depends upon its remoteness in time, and not upon the character of the contingency—was established. See Gray, Perp., Ch. V; also Mr. Hargrave's argument in the *Thellusson Case*, cited with approval by Mr. Butler in the note to Fearne's C. R. 429. But there arose this curious anomaly, that while executory bequests of terms of years became subject to the new Rule against Perpetuities, they remained subject to the old Rule, for it had long been settled that land could no more be limited to the unborn issue of a person in succession, as purchasers, for more than one generation, by means of terms of years, than by means of contingent remainders. It is not to be wondered at that this overlapping of the two Rules should have given rise to much confusion of thought.

(*q*) *Cadell* v. *Palmer*, 1 Cl. & F. 372.

(*r*) Mr. Gray remarks, with great truth, that the name given to the Rule has caused much confusion and misconception, because it implies that the Rule is directed against the kind of perpetuity which is forbidden by the Rules above stated (Sects. I and II of this Chapter). "It would have been better," he says, "had it been called the Rule against Remoteness" (Perp., § 2). It is not clear when the Rule first came to be known as the Rule against Perpetuities: Mr. Fearne carefully distinguishes between "remoteness" and "perpetuity," although he refers them both, with perfect correctness, to the general principle of law which forbids the creation of inalienable interests.

(*s*) *Bennett* v. *Bennett*, 2 Dr. & Sm. 266; *Kingham* v. *Kingham*, [1897] 1 Ir. R. 170; *Edwards* v. *Edwards*, [1909] A. C. 275; *Re Backhouse*, [1921] 2 Ch. 51 (picture).

(*t*) *Cadell* v. *Palmer*, 1 Cl. & F. 372.

(*u*) See *Thellusson* v. *Woodford*, 4 Ves., at p. 341; *Pownall* v. *Graham*, 33 Bea. 242.

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this must be understood to mean the lives of named persons (*x*). The true rule is laid down by Macdonald, C.B., in *Thellusson* v. *Woodford* (*y*), where he says that any number of lives may be taken, "the extinction of which could be proved without difficulty," and that where attempts are made to tie up property "during the lives of all the individuals who compose very large societies or bodies of men," such limitations "will be put to the usual test, whether they will or will not tend to a perpetuity, by rendering it almost, if not quite, impracticable to ascertain the extinction of the lives described, and will be supported or avoided accordingly." "The language of all the cases is, that property may be so limited as to make it inalienable during any number of lives, not exceeding that, to which testimony can be applied, to determine when the survivor of them drops" (*z*). It is submitted that the trusts in *Re Moore* (*a*) were clearly void within the Rule.

Re Villar.

In *Re Villar* (*b*) a testator, who died in 1926, gave his property in trust in such a way that it would not vest indefeasibly until twenty years from the death of the last survivor of all the lineal descendants of Queen Victoria living at his death. Astbury, J., held, reluctantly, that the trust was valid although there were in existence about 120 descendants of Queen Victoria in various countries, and it would be very difficult and expensive to ascertain the date of the survivor's death. This decision was affirmed by the Court of Appeal (*bb*).

"Life" must be human.

It is hardly necessary to say that, for the purposes of the Rule, "life" means the life of a human being (*c*).

Commencement of period.

Every person whose life is specified as forming part of the period allowed by the Rule must be in existence at the death of the testator, a child *en ventre sa mère* being deemed to be in existence for the purposes of the Rule (*d*). If no life is specified then the period of twenty-one years is calculated from the death of the testator. In any case, the period of twenty-one years is to be taken as a term in gross, without reference to the infancy of

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(*x*) "A man may appoint 100 or 1,000 trustees, and that the survivor of them shall appoint a life estate, that would not be within the line of perpetuity": *per* Lord Thurlow in *Robinson* v. *Hardcastle*, 2 Br. C. C. 30

(*y*) 11 Ves., at pp. 134, 136; cited by Gray, § 217.

(*z*) *Per* Lord Eldon, 11 Ves. 146.

(*a*) [1901] 1 Ch. 936, stated *post*, p. 430.

(*b*) [1928] 1 Ch. 471.

(*bb*) [1929] 1 Ch. 243.

(*c*) If and so far as *Re Dean* (41 Ch. D. 552) decided that the Rule can be extended to the lives of animals, it is submitted that the decision is erroneous (*ante*, p. 249).

(*d*) *Long* v. *Blackall*, 7 T. R. 100; *Blackburn* v. *Stables*, 2 V. & B. 367.

any person. A period is allowed for gestation only in those cases where gestation actually exists (*e*).

Period of gestation.

Mr. Jarman thus states the law with reference to the period of gestation (*f*) : " A possible addition of the period of gestation to a life and twenty-one years, occurs in the ordinary case of a devise or bequest to A (a person of the *male* sex) for life, and after his death to such of his children as shall attain the age of twenty-one years, or, indeed, in the case of a devise or bequest simply to the children of A (a male) who shall attain majority, though not preceded by a life interest; in either case A may die leaving a wife *enceinte*, and, as such child would not acquire a vested interest until his majority, the vesting would be postponed until the period of twenty-one years beyond a life in being, with the addition, it might be, of nine or ten months; and if, to either of these suppositious cases, we add the circumstance that A, the parent, were (as of course he might be) an infant *en ventre sa mère* at the testator's decease, there would be gained a double period for gestation (namely), one at the commencement, and another at an intermediate part of the period of postponement. To treat the period of gestation, however, as an adjunct to the lives, is not, perhaps, quite correct. It seems more proper to say that the rule of law admits of the absolute ownership being suspended for a life or lives in being, and twenty-one years afterwards, and that, for the purposes of the rule, a child *en ventre sa mère* is considered as a life in being " (*g*).

Vesting cannot be postponed for a gross term exceeding twenty-one years.

Where the vesting of a gift is postponed for a fixed term exceeding twenty-one years, the gift is unquestionably void, although not preceded by a life; for the fact of the testator not having availed himself of the allowance of a life does not enable him to take a larger number of years. Thus, in *Palmer* v. *Holford* (*h*), where a testator bequeathed a sum of stock upon trust to raise an accumulated fund, and to transfer such fund to the children of his son C. T. H., who should be living at the expiration of twenty-eight years from the testator's decease, except an eldest or only son; and in case no such child should be then living, then over; Sir J. Leach, M.R., said : " The expressed intention of the testator is that all the children of his son

(*e*) *Cadell* v. *Palmer*, 7 Bli. (N.S.) 202; 1 Cl. & Fin. 372; 10 Bing. 140; 1 Sim. 173, *nom. Bengough* v. *Edridge*. See as to this case, Sugden, Law of Prop. 314.

(*f*) First edition, p. 222.

(*g*) The doctrine thus stated by Mr. Jarman has been established by the decision in *Re Wilmer's Trusts*, [1903] 1 Ch. 874; 2 Ch. 411.

In *Re Wass* ([1882] W. N. 158) there was a gift to such of the children of A as should be living at the time of the testator's decease or born in due time thereafter : it was held by Kay, J., that the words " born in due time " did not refer to the period of gestation. *Sed quære.*

(*h*) 4 Russ. 403; and see *Speakman* v. *Speakman*, 8 Hare, 180.

C. T. H., other than an eldest son, should take who were living at the expiration of twenty-eight years, and that no person should take before that period. If C. T. H. had such children born to him at any time within seven years from the testator's death, then the vesting of the interests of such children who were unborn at the death of the testator would have been suspended for more than twenty-one years, and the gift, therefore, is too remote and void; and the gifts over not being to take effect until after the same period, which is too remote, are necessarily void also."

"The principle of this case," says Mr. Jarman (*i*), "clearly would apply where any, the most inconsiderable, addition was made to the term of twenty-one years; therefore a devise to such of the grandchildren of the testator as should be living at the expiration of twenty-one years and one day from the testator's decease, would clearly be void."

But care must be taken to distinguish those cases in which the gift is limited to persons living at the testator's death. Thus in *Lachlan* v. *Reynolds* (*k*) the testator gave his property upon certain trusts for his wife and children, and when thirty years were expired he ordered it to be sold and two-thirds to be divided amongst his children then living; it was held that the trust was good.

Possible, not actual, events to be considered.

If vesting depends on an event which may possibly happen after the expiration of the period allowed by the Rule, the gift is void, however improbable it may be that the event should happen after that period, and even if it does in fact happen within the period. Thus, in *Hodson* v. *Ball* (*l*), a gift over of a share of any child of the testator, in case of failure of its issue at any time during the life of the child's husband or wife, was held void; since the husband or wife might be a person not born at the testator's death, and might survive the child more than twenty-one years, and the gift over would thus take effect after the expiration of a life and twenty-one years. Again, a gift to such of the children and grandchildren of A (a married woman having children living) as attain twenty-one, is void for remoteness, however old A may be, and although in fact all her children and grandchildren attain twenty-one within the period allowed by the Rule, for the law will not assume that she may not have

(*i*) First edition, p. 231.

(*k*) 9 Ha. 796. A question arose as to the meaning of the words "or their heirs," following the gift to the children: see *Wingfield* v. *Wingfield*, 9 Ch. D. 658.

(*l*) 14 Sim. 558. *Ward* v. *Van der Loeff*, [1924] A. C. 687 is a recent instance of this principle.

a child born a year after the testator's death, in which case, of course, a child of that child could not attain twenty-one within the period allowed by the Rule; consequently, evidence that A is past the age of child-bearing is not admissible (*m*). So where a testator directed his trustees to carry on his business of a gravel contractor until his freehold gravel pits were worked out, and then upon trust to sell them and hold the proceeds of sale in trust for such child or children of his "then living" and such issue living of any child or children then deceased as should attain twenty-one, these trusts were held void, although it appeared that the pits were almost worked out at the testator's death, and were, in fact, worked out a few years afterwards (*n*).

Future trust for sale.

In deciding the question of remoteness, the state of circumstances at the date of the testator's death, and not their state at the date of the will, is to be regarded. Thus, if a testator bequeaths money in trust for A for life, and after his death for such of his children as shall attain the age of twenty-five, the latter trust would be void if the testator were to die before A; yet if A should die before the testator leaving children, of whatever age, the trust will be good, since it must of necessity vest or fail within lives in being, *viz.*, the lives of the children (*o*). Again, if a testator has, under a settlement, a special power of appointment among his children, and by his will appoints the property to his daughters who shall survive him and attain twenty-four, and his youngest daughter is more than three years old at the time of his death, the appointment is good (*p*). This rule is of importance where the donee of a power to appoint to children wishes to give a child a life interest, followed by a general testamentary power of appointment (*q*).

State of things existing at testator's death to be regarded.

The application of the Rule to charitable gifts, and to gifts to private persons to take effect after the failure or determination of a charitable gift, is discussed *post*, p. 342.

Charitable gifts.

A future interest is not obnoxious to the Rule if it begins

Future interest may extend beyond the period allowed by the Rule.

(*m*) *Re Dawson*, 39 Ch. D. 155, following *Jee* v. *Audley*, 1 Cox, 324 (stated *post*, p. 314), and *Re Sayer's Trusts*, L. R. 6 Eq. 319. The decision of Malins, V.-C., in *Cooper* v. *Laroche*, 17 Ch. D. 368, may be disregarded.

(*n*) *Re Wood*, [1894] 3 Ch. 381, following *Lord Dungannon* v. *Smith*, 12 Cl. & F. 546; *Re Roberts*, 50 L. J. Ch. 265. *Thomas* v. *Thomas*, 87 L. T. 58, and *Re Bewick*, [1911] 1 Ch. 116, were decided on the same principle. This doctrine is considered more in detail in connection with gifts to classes (*post*, p. 300).

(*o*) *Vanderplank* v. *King*, 3 Hare, 17; *Faulkner* v. *Daniel*, *ib.* 216; *Williams* v. *Teale*, 6 Hare, 239; *Peard* v. *Kekewich*, 15 Bea. 173; *Southern* v. *Wollaston*, 16 Bea. 166, 276; *Cattlin* v. *Brown*, 11 Hare, 382; *Wilkinson* v. *Duncan*, 30 Bea. 111. The point is now never contested, see *e.g.*, *Hale* v. *Hale*, 3 Ch. D. 645.

(*p*) *Von Brockdorff* v. *Malcolm*, 30 Ch. D. 172; *Re Thompson*, [1906] 2 Ch. 199, stated *post*, p. 290.

(*q*) *Post*, p. 289.

within the proper period, although it may end beyond it (*r*); in which case, if it is a limited interest, it may tie up the property for more than twenty-one years beyond a life in being. Thus, if property is given upon trust for the unborn children of A until the youngest attains twenty-one, and then upon trust for all of them during their lives, this is good (*s*). So, if property is given upon trust for A for life, and after his death upon trust to pay the income to his children equally until the youngest attains twenty-five, this trust is good (*t*). But if the trust were a discretionary one, for the maintenance of any child or children of A until the youngest attained twenty-five, and for the accumulation of surplus income, it would be bad, because no child would take a vested interest within the period allowed by the Rule (*u*). Limitations of this kind arise chiefly in the case of gifts to unborn persons, and the subject is therefore discussed in detail in a subsequent part of this chapter (*x*), where also the question of the validity of limitations following a gift of this nature is referred to.

Clause of cesser or forfeiture.

On the same principle, if a remainder or reversionary interest is vested, that is, if it is ready to take effect whenever and however the particular estate determines, it is immaterial that the particular estate is determinable by a contingency which may fall beyond a life or lives in being (*y*). Thus, if property is given to the eldest child of A, a bachelor, for life, or until he or she shall become a Roman Catholic, and subject as aforesaid to the other children of A absolutely, and A, after the death of the testator, has three children, X, Y, and Z, here Y and Z take vested interests, and the gift in remainder to them is good (*z*). But if in such a case the gift over is in favour of a class which cannot be ascertained until the particular estate determines, the gift over is void for remoteness (*a*). And if the gift over is dependent on a preceding gift which fails for remoteness, the gift over shares its fate (*b*).

Gift contingent in form only.

It sometimes happens that a gift which appears to transgress the Rule is valid, because the interests created, although in form

(*r*) See the general principle as stated by Mr. Jarman, *post*, p. 322; *Re Cassel*, [1926] 1 Ch. 358.

(*s*) *Gooch* v. *Gooch*, 3 D. M. & G. 366.

(*t*) *Gooding* v. *Read*, 4 D. M. & G. 510. As to discretionary trusts exercisable beyond the limits of the Rule, see *Re Boulton's Settlement Trust*, [1928] Ch. 703.

(*u*) *Re Blew*, [1906] 1 Ch. 624, explaining *Re Wise*, [1896] 1 Ch. 281, *Re Cooper*, [1913] 1 Ch. 350, and *Re Watson*, [1892] W. N. 192.

(*x*) *Post*, p. 322.

(*y*) Gray, § 209.

(*z*) *Wainwright* v. *Miller*, [1897] 2 Ch. 255 (settlement by deed).

(*a*) *Hodgson* v. *Halford*, 11 Ch. D. 959; *Re Gage*, [1898] 1 Ch. 498.

(*b*) *Post*, p. 324.

contingent, are really vested. Thus, an immediate gift to the children of A who attain the age of twenty-five is good, if one of them has attained that age before the testator's death (*c*). So in *Fox* v. *Fox* (*d*), a testator directed his trustees to raise a sum of £15,000, and after the determination of certain life interests to divide and transfer one-fifth of the fund to and amongst the children of T equally, as and when they should respectively attain the age of twenty-five years, applying from time to time the income of the presumptive share of each child, or so much thereof as the trustees might think proper, for his and her maintenance and education until such share should become payable as aforesaid; but if T should leave no children him surviving, or if he should leave children and they should all die before attaining the age of twenty-five years, then over: it was held that, under the doctrine referred to in a subsequent part of this work (*e*), the children of T took vested interests, and consequently that the gift to them was not void for remoteness (*f*).

Fox v. *Fox*.

Distinction as to contingent remainders.

Whether the modern Rule against Perpetuities does or does not apply to contingent remainders (a question discussed later, p. 343), it was well settled that there is a distinction between executory devises and legal contingent remainders in this respect, that a limitation may be good as a contingent remainder, although it would have been void as an executory devise. Thus, if land is devised to A, a bachelor, for life, with remainder to such son of his as first attains twenty-five, this remainder is good, because it must vest, if at all, on A's death, that is, within the period allowed by the Rule. This apparent exception to the Rule is discussed in connection with gifts to classes (*g*).

As to contingent limitations by way of remainder in equitable interests.

Contingent remainders of trust or equitable estates are not governed by the same rule as contingent remainders of legal estates; for they do not necessarily vest or fail upon the determination of the previous estate, but await the happening of the contingency on which they are limited (*h*), and are, therefore,

(*c*) *Picken* v. *Matthews*, 10 Ch. D. 264, *post*, p. 303.

(*d*) L. R. 19 Eq. 286.

(*e*) *Post*, pp. 1383 *seq.*

(*f*) *Fox* v. *Fox* has been approved by the Court of Appeal in *Re Turney* ([1899] 2 Ch. 739), also a case where the question of remoteness arose. The subsequent cases are considered by Astbury, J., in *Re Ussher*, [1922] 2 Ch. 321.

(*g*) *Post*, pp. 301, 302. Legal remainders are now abolished.

(*h*) *Hopkins* v. *Hopkins*, Ca. t. Talb. 44; 1 Atk. 581; *Chapman* v. *Blisset*, Ca. t. Talb. 150; *Astley* v. *Micklethwait*, 15 Ch. D. 59; *Marshall* v. *Gingell*, 21 Ch. D. 790; *Re Brooke*, [1894] 1 Ch. 43. As to gifts to classes, see *post*, p. 300; and as to the effect of an equitable contingent remainder being converted into a legal one by the re-conveyance of the legal estate, see *Re Freme*, [1891] 3 Ch. 167; *Re Robson*, [1916] 1 Ch. 116 (assent by executors).

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invalid if that contingency be too remote (*i*). But, like executory devises, they are good after an estate tail, if limited on an event which must necessarily happen at or before the determination of that estate, as in the case of a trust for a class to be ascertained at or before such determination (*k*).

Attempt to postpone enjoyment.

If a vested interest in property is given to a person, with a direction that payment or possession shall be postponed for a period beyond the limits allowed by the Rule, this direction, being inoperative, does not affect the validity of the gift. Thus, where (*l*) lands were devised to trustees and their heirs, in trust for A for life, remainder in trust for B for life, remainder unto and among all and every the issue, child and children of B as should be living at the time of the decease of the survivors of A and B, to be divided, share and share alike, when and as they should respectively attain the age of twenty-four years, and to their respective heirs, etc., and if only one, then the whole to such only or surviving child in fee upon attaining the said age : it was contended that the gift to the children was too remote; but the Court of C. P., on a case from Chancery, certified that the children living at the death of the survivor took vested interests.

Trust for accumulation.

On the same principle, if a testator directs the income of his property to be accumulated until it produces the sum of "£3000 or thereabouts," and then to hold it in trust for A, B, C, and D during their lives, and after the death of the survivor upon trust for their issue, these trusts are not void for remoteness, because the issue take vested interests on the death of the last tenant for life, and if the fund has not then reached £3,000, they can stop the accumulation (*m*).

Question whether gift is contingent, or vested subject to being divested.

Where, however, there is a direction that payment or possession shall be postponed, "it is often," as Mr. Jarman points out (*n*), "a matter of no inconsiderable difficulty, from the ambiguity of the testator's language, to determine whether the postponement applies to the vesting or only to the enjoyment;

(*i*) *Monypenny* v. *Dering*, 7 Ha. 568, 590; *Garland* v. *Brown*, 10 L. T. 292; *Abbiss* v. *Burney*, 17 Ch. D. 211. As to the distinction between equitable contingent remainders and executory interests, see *Richardson* v. *Harrison*, 16 Q. B. D. 85.

(*k*) *Heasman* v. *Pearse*, L. R. 7 Ch. 275; *Re Haygarth*, [1912] 1 Ch. 510.

(*l*) *Farmer* v. *Francis*, 9 J. B. Moo. 310; 2 Bing. 151; see also *Murray* v. *Addenbrook*, 4 Russ. 407; *Jackson* v. *Marjoribanks*, 12 Sim. 93; *Milroy* v. *Milroy*, 14 *ib.* 48; *Greet* v. *Greet*, 5 Bea. 123; *Harrison* v. *Grimwood*, 12 *ib.* 192.

(*m*) *Oddie* v. *Brown*, 4 De G. & J. 179. As to trusts for accumulation, see *post*, p. 280.

(*n*) First edition, p. 253.

and if the original gift is followed by a clause disposing of the shares of objects dying under the specified age, a further and still more perplexing question arises; namely, whether the vesting is originally deferred until the prescribed age, or the shares are immediately vested, with a liability to be divested; in other words, whether the specified age is the period of vesting or the period of the shares becoming absolute, in case of the objects dying before such age (*o*). This question, which is fully discussed in a future chapter (*p*), is most important in reference to the application of the Rule against Perpetuities, for if the shares are immediately vested, and the remoteness affects only the clauses of accruer, or other the gifts engrafted on or limited in derogation of the original gift, the effect of the Rule is not to invalidate such original gift, but to render it absolute, by relieving it from the clauses which qualified or divested the interests of its objects" (*q*).

The question whether a gift is contingent on the happening of a remote event, and therefore void under the Rule, or whether it is vested subject to being divested, and therefore good, most frequently arises in the case of gifts to children and other classes (*r*).

Where vested interest may not come into possession until after period allowed by rule.

If a future interest is vested, it is immaterial that the particular interest which precedes it is determinable by a contingency which may happen beyond the limits allowed by the Rule. Thus, if property is given to an unborn person until he dies or changes his name, and then to B, a living person, B has a vested interest, for he will take the property whether the tenant for life dies or changes his name, although the determination of his life interest is contingent on an event which may not take place within the period allowed by the Rule (*s*).

Interests must be ascertained within period.

If the persons to whom a gift is made may not be ascertained

(*o*) The latter construction was the one adopted in *Re Turney*, [1899] 2 Ch. 739; the wording of the will was peculiar.

(*p*) "As these cases are dealt with on the ordinary and general principles of interpretation, which are unsparingly applied without regard to consequences, and the fact of any proposed construction rendering the intended gift void for remoteness is not allowed to exert any influence, it is obvious that the cases referred to in the text, have no peculiar connection with the subject of the present section, but belong rather to the chapter which treats of the vesting of estates, where, accordingly, they will be found. *Vide Doe* d. *Roake* v. *Nowell*, 1 M. & Sel. 327; 5 Dow, 202; and other cases, *post*; also *Vawdry* v. *Geddes*, 1 R. & My. 203; *Blease* v. *Burgh*, 2 Bea. 221" [Note by Mr. Jarman]. See also *Ring* v. *Hardwick*, 2 Bea. 352.

(*q*) See the cases cited above, p. 274. As to the invalidity of modifying and qualifying clauses, see *post*, p. 336. A modifying or qualifying clause may be void on the ground that it is repugnant to the nature of an absolute interest: see Chap. XVII, *post*, p. 536.

(*r*) See *post*, pp. 300 *seq.*, and Chap. XLII.

(*s*) Gray on Perp., § 209; *Re Roberts*, 19 Ch. D. 520; *Re Norton*, [1911] 2 Ch., at pp. 37, 38.

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within the required limits, the gift is too remote, although all the persons who can possibly claim under the gift must be determined within those limits, and a conveyance by them would, therefore, pass the entire interest (*t*). It was indeed formerly supposed, that if property were limited in such a way that all the persons in whom it must ultimately vest were ascertained within the period allowed by the Rule, so that they could together dispose of it absolutely before the expiration of that period, the limitation would be good, although their individual interests might possibly not be ascertained within the period; but it is now settled that this consideration does not prevent the application of the Rule (*u*).

Gift to living person may be too remote.

A contingent gift of a transmissible interest to a living person is bad if it may not vest within the period allowed by the Rule (*x*). But a gift to a living person, if living at the end of forty-nine years, or to his issue if he be then dead leaving issue, must take effect, if at all, within the limits allowed by the Rule, and is therefore good (*y*). Whether a gift to an existing person for his life is good, although preceded by interests which are void for remoteness, is discussed later (*z*).

Restrictions on alienation.

It has been decided that the Rule applies to restrictions on alienation; as, for example, where property is given to an unborn woman with a restraint on anticipation (*a*). Thus, in *Re Teague's Settlement* (*b*), a widow having under her marriage settlement a power of appointment among the children of the marriage, appointed a share of the fund to one of her daughters without power of anticipation : it was held that the appointment was good, but that the restraint upon anticipation was void for remoteness.

The cases in which a gift has been held to be absolute, and

(*t*) Gray, Perp., § 268.

(*u*) See *Avern* v. *Lloyd*, L. R. 5 Eq. 383; *Edmondson's Estate*, *ib.* 389; *Hobbs* v. *Parsons*, 2 Sm. & G. 212; and the cases referred to in *London & S. W. Ry.* v. *Gomm*, 20 Ch. D. 562; *Curtis* v. *Lukin*, 5 Bea. 147, *post*, p. 324; *Re Hargreaves*, 43 Ch. D. 401.

(*x*) *Grey* v. *Montagu*, 3 Br. P. C. 314; *Re Brown and Sibly's Contract*, 3 Ch. D. 156; *Re Norton*, [1911] 2 Ch., at p. 40.

(*y*) *Re Daveron*, [1893] 3 Ch. 421.

(*z*) *Post*, p. 326.

(*a*) This extension of the Rule, as Mr. Gray points out (§§ 118 a *et seq.*), has arisen from a mistaken theory of the true nature of the Rule, but it is too firmly established to be shaken.

(*b*) L. R. 10 Eq. 564. Followed by Malins, V.-C., in *Re Cunynghame's Settlement*, L. R. 11 Eq. 324, and (reluctantly) by Jessel, M.R., in *Re Ridley*, 11 Ch. D. 645; but the actual decision in the latter case was wrong, as both daughters were born in the testator's lifetime. See *Fry* v. *Capper*, Kay, 163; *Armitage* v. *Coates*, 35 Bea. 1; *Re Michael's Trusts*, 46 L. J. Ch. 651; and *Re Ferneley's Trusts*, [1902] 1 Ch. 543, *post*, p. 339.

therefore good, notwithstanding a subsequent direction that it shall be held upon trusts which are too remote, are referred to in a subsequent part of this chapter (*c*).

Where gift divisible.

Where property is given to a class, with a direction that the share of each member shall be subject to a restraint on alienation, the restraint may be good in the case of some members of the class, and bad in the case of the others. The cases in which a direction to settle the shares of members of a class has been held good as regards those who are *in esse* at the death of the testator, are referred to in a subsequent part of this chapter (*d*). So in a gift of property to a class, a restraint on anticipation may be good as regards those members of the class who are *in esse* when the gift takes effect (*e*). In *Re Millward* (*f*), a restraint on anticipation imposed on the members of a class consisting of the testator's grandchildren, was held good during the existence of the prior life interests.

Defeasible interest may be made absolute by operation of Rule.

If property is given to A, with a proviso that on the happening of an event which need not necessarily happen within the limits of the Rule, the property shall go over to B, the proviso is void, and A takes absolutely. Thus, in *Harding* v. *Nott* (*g*), the testator devised a term of years to his son R, subject to a proviso that if R or his issue male should become entitled to a certain estate, the term should go over to X; R's issue male became entitled to the estate, but it was held that the term did not go over, the proviso being bad for remoteness. So in *Hobbs* v. *Parsons* (*h*), there was a gift to the children of A and B, with a gift over on death under twenty-two: it was held that the divesting clause was void. *Re Edmondson's Estate* (*i*) is a similar decision. But if the gift over must take effect, if at all, within the period allowed by the Rule, it is good. Thus, in *Re Turney* (*k*), where a testator bequeathed a fund to A for life, and after his death to his children absolutely on their attaining twenty-five, with a proviso that if any child died under twenty-five the share of that child should go to B, it was held (on the

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(*c*) *Post*, p. 336.

(*d*) *Post*, p. 308. The latest is *Re Russell*, [1895] 2 Ch. 698.

(*e*) *Herbert* v. *Webster*, 15 Ch. D. 610; *Cooper* v. *Laroche*, 17 Ch. D. 368; *Re Ferneley's Trusts*, [1902] 1 Ch. 543, *post*, p. 339.

(*f*) 87 L. T. 476.

(*g*) 7 E. & B. 650. See this case referred to, *post*, p. 338. The rule in *Doe* v. *Eyre* (*post*, pp. 1338, 1409) does not apply to a gift over which is void for remoteness (see pp. 1410, 1431); Farwell on Powers (3rd ed.), p. 349, citing *Re Brown and Sibly's Contract*, 3 Ch. D. 156.

(*h*) 2 Sm. & G. 212. See also *Re Baxter's Trusts*, 10 Jur. (N.S.) 845; *Re Brown and Sibly's Contract*, 3 Ch. D. 156.

(*i*) L. R. 5 Eq. 389; *Re Staveley's Trusts*, 124 L. T. 466 (condition void for remoteness).

(*k*) [1899] 2 Ch. 739.

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principle stated elsewhere (*l*), that the children took vested interests, subject to their being divested in the case of any children who did not attain twenty-five.

Reversionary term of years.

On the principle that vested interests are beyond the scope of the Rule, it is submitted that there is no foundation for the view, which appears to be held by some text-writers and practitioners, that the gift of a term of years, to commence at a fixed date beyond the period allowed by the Rule, is void for remoteness. A term of years to commence *in futuro* is a vested interest. Such a term was certainly not open to objection on the score of remoteness in the year 1837 (*m*), and nothing has happened since then to alter the law. The case of *Beard* v. *Westcott* (*n*) is sometimes cited as bearing on this point; but in that case reversionary terms of years were devised to the male issue of A in succession, with the intention of creating an unbarrable entail; the limitations to the issue after the first generation were void under the old rule against perpetuities (*ante*, p. 253).

Trusts.

(B) TRUSTS AND POWERS.—The operation of the Rule is not confined to beneficial interests, but extends also to trusts and powers. Thus if lands are devised in strict settlement, with a direction to the trustees in certain events to revoke the limitations and resettle the lands in favour of persons beyond the limits of the rule, this direction is void (*o*). So a trust for sale is bad if it cannot (or may not) arise until after the period allowed by the rule (*p*). But an immediate trust for sale (if the beneficiaries to take under it must be ascertained within due limits of time) is not void for remoteness, although no limit is put to the time within which it may be exercised; as soon as the beneficiaries attain vested interests they can insist on the trust being carried out, unless they elect to take the property in specie (*q*).

Trust for sale.

(*l*) See p. 273.

(*m*) *Smith* v. *Day*, 2 M. & W. 684. This and other cases are referred to in an article in 50 Sol. J. p. 760. See also *Redington* v. *Browne*, 32 L. R. Ir. 347. After 1925 a lease at a rent cannot be granted to commence at a period more distant than twenty-one years (Law of Property Act, 1925, s. 149, sub-s. 3).

(*n*) 5 B. & Ald. 801.

(*o*) See *Duke of Marlborough* v. *Earl Godolphin*, 1 Ed. 404. The real ground of the decision in that case was that as the object aimed at by the settlor could not have been effected by a limitation of the legal estate (which would admittedly have been void under the old rule forbidding the creation of perpetuities, *ante*, p. 256), it could not be effected by means of a trust or power. *Mainwaring* v. *Baxter*, 5 Ves. 458, was decided on the same principle.

(*p*) *Hale* v. *Pew*, 25 Bea. 335; *Goodier* v. *Edmunds*, [1893] 3 Ch. 455; *Re Wood*, [1894] 3 Ch. 381, *ante*, p. 271.

(*q*) *Biggs* v. *Peacock*, 22 Ch. D. 284; *Re Douglas and Powell*, [1902] 2 Ch. 296. See *Re Tweedie and Miles*, 27 Ch. D. 315.

In *English* v. *Cliff* (*r*) there was a direction to sell at the expiration of a term of twenty-one years from the date of the settlement, and it was held that the term commenced at midnight of the day before the date of the settlement and that the trust was not void for remoteness.

A power to redeem a rentcharge may be void for perpetuity (*s*).

Discretionary trust.

A discretionary trust seems to be similar to a power of appointment; that is to say, if it can only be exercised within the limits of the Rule it is good, but if it can be exercised beyond those limits it is bad (*t*). Thus, a discretionary trust for the benefit of the unborn children of A during their lives, with a trust to accumulate the unapplied income, is bad, because, until the discretion is exercised, no child has a vested right, and if the discretion were exercised beyond the limits of the Rule, an infringement of it would necessarily result (*u*).

But if there is a gift to a class of unborn persons not in itself too remote, with a separate power giving the trustees a discretion as to the application of the income during a period beyond the limits of the rule, it seems that the original gift would be good, and only the discretionary trust bad (*x*).

Trust to maintain a house.

In *Re Cassel* (*y*), the testator directed that the outgoings payable in respect of a particular leasehold house and stable should always be paid by his trustees out of the income of his residuary personal estate. This clause was construed to mean that the income of the residuary personal estate was charged, during (a) the term of the leases, and (b) such time as the leases remained the property of a beneficiary deriving title directly under the will, with the payment of an annual sum in relief and for the personal benefit of such beneficiary, the annual sum varying in amount according to certain ascertainable facts. This trust was held good since the right to have the annual sum must vest within the perpetuity period, and that although the amount of the annual sum was expressed in uncertain terms it was always capable of being rendered certain. It is instructive to compare this case with *Re Kennedy* (*z*) where there was a discretionary trust to maintain a house, which was held to be not

(*r*) [1914] 2 Ch. 376.
(*s*) *Re Donoughmore's Estate*, [1911] 1 Ir. R. 211.
(*t*) *Post*, p. 281. Gray, § 246.
(*u*) *Re Blew*, [1906] 1 Ch. 624. The decisions in *Re Wise*, [1896] 1 Ch. 281, and *Re Watson*, [1892] W. N. 192, seem to be based on a misapprehension of *Gooding* v. *Read*, 4 D. M. & G. 510, *ante*, p. 272. The decision in *Pride* v. *Fooks*, 2 Bea. 430, with reference to the power of advancement, also seems contrary to principle.
(*x*) Gray, § 439.
(*y*) [1926] Ch. 358.
(*z*) [1914] A. C. 215.

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merely for the personal benefit of the persons to whom the testator had given a beneficial interest in the house but for the benefit of all persons for the time being interested in the house until the sale thereof. Since the house might not be sold within the period allowed by the rule the discretionary trust was void.

Trust to make up an income to a fixed sum.

In *Re Whiteford* (*a*), the testatrix had under her marriage settlement a power of appointment by will in favour of her five sons one of whom was a lunatic. She appointed that so much of the income of two fifths of the settled fund as should be required to make up the total income of the lunatic to £200 p.a. should be applied in such a manner as the trustees should think fit for the maintenance of the lunatic and divided the residue amongst her other four sons. It was held that since the interest which the lunatic and his brothers took each year was contingent on the amount of the yearly income of the lunatic the trust was void for remoteness. This case was not cited in *Re Cassel*, where the amount to be paid was contingent on the outgoings for each year. It is not easy to reconcile the two cases.

Trusts for accumulation.

Trusts for accumulation of income are subject to special restrictions and exemptions. As a general rule, a trust for accumulation beyond the limits allowed by the Rule is bad (*b*), independently of the Thellusson Act (*c*). But trusts for accumulation to pay debts or mortgages are not within the mischief of the Rule (*d*). And where property is given to a person absolutely, with a superadded direction to accumulate the income beyond the limits allowed by the Rule, the direction may be disregarded, on the ground that it is an illegal restraint on ownership (*e*). But, of course, this principle does not apply where the vesting is postponed until the expiration of the period of accumulation (*f*).

Failure of trust need not affect beneficial interests.

It may happen that a trust is bad, and that the persons intended to be benefited by it are, nevertheless, entitled to the property. Thus, in *Re Daveron* (*g*), a testator devised a freehold house to trustees, subject to a lease which had forty-nine years unexpired, upon trust to pay the rent arising therefrom, so long as the lease should run, to certain named persons : and,

(*a*) [1915] 1 Ch. 347.

(*b*) *Curtis* v. *Lukin*, 5 Bea. 147; *Lord Southampton* v. *Hertford*, 2 V. & B. 54; *Scarisbrick* v. *Skelmersdale*, 17 Sim. 187; *Smith* v. *Cuninghame*, 13 L. R. Ir. 480.

(*c*) *Post*, p. 352.

(*d*) *Post*, p. 342.

(*e*) *Post*, p. 343; *Phipps* v. *Kelynge*, 2 V. & B. 57, n.; *Oddie* v. *Brown*, 4 De G. & J. 179; *ante*, p. 274.

(*f*) See cases cited in note (*b*).

(*g*) [1893] 3 Ch. 421. See also *Goodier* v. *Edmunds*, [1893] 3 Ch. 455; *Re Appleby*, [1903] 1 Ch. 565. In *Re Wood*, [1894] 3 Ch. 381, and *Re Bewick*, [1911] 1 Ch. 116, the whole gift was void for remoteness : *ante*, p. 271.

"upon the expiration of the lease," he directed that the freehold should be sold, and the proceeds thereof distributed in thirds among certain other named persons, ascertainable within the limits of the Rule. It was held that, notwithstanding the invalidity of the trust for sale, the legatees of the proceeds of sale were entitled to the benefits intended for them by the testator, by taking the property as real estate. If, however, an immediate trust is created, but it is possible that no equitable interest under it may arise within the limits of the rule, the whole trust is bad (*h*).

Executory trusts.

In executing an executory trust, the Court, will, if possible, mould the limitations in such a way as to avoid infringing the Rule against Perpetuities (*i*).

If an executory trust must be executed, if at all, within the required limits, and the trust, when executed, is such as would have been good if executed by the testator, it is valid. The possibility that it may not be capable of such execution does not render it wholly void (*k*). Where an executory trust relating to leaseholds is created by reference to a trust relating to freeholds, and would, if applied verbatim to the leaseholds, be bad for remoteness, it ought to be so modified as to render it free from that objection (*l*). As to the cases where executory trusts will be executed *cy-près*, see above, p. 259.

When power is too remote.

With regard to powers, the general rule is that if a power can be exercised at a time beyond the limits of the Rule (which happens where the donee of the power and the occasion on which it can be exercised, may both be in existence beyond the limits of the Rule) the power is bad (*m*). Thus, a power which is to take effect on a general failure of the issue of a marriage, or a power to appoint by will given to a person who may not be ascertained within the limits of the rule, is bad (*n*). On the other hand, a power which must be exercised, if at all, during the period allowed by the Rule, is not rendered bad by the fact that within its terms an appointment could be made which would be too remote; as, where a power is given to A to appoint to the

(*h*) *Mainwaring* v. *Baxter*, 5 Ves. 458; *Re Wood, supra*, n. (*g*).

(*i*) The principal cases are, *Duke of Newcastle* v. *Lincoln*, 3 Ves. 387; *Bankes* v. *Le Despencer*, 10 Sim. 576 (more fully in 7 Jur. 210); *Sackville-West* v. *Holmesdale*, L. R. 4 H. L. 543; *Miles* v. *Harford*, 12 Ch. D. 691. As to executory trusts, see Chap. XXIV, *post*, p. 879.

(*k*) Gray on Perp., §§ 419 *et seq.*, citing *Tregonwell* v. *Sydenham*, 3 Dow, 194. See further as to this case (which Mr. Gray calls "a case of extraordinary difficulty"), *ante*, p. 261, and *post*, pp. 297, 317; Marsden, Perp., 138.

(*l*) *Miles* v. *Harford*, 12 Ch. D. 691, quoted *post*, p. 673.

(*m*) Gray, Perp., § 475.

(*n*) *Bristow* v. *Boothby*, 2 S. & St. 465; *Wollaston* v. *King*, L. R. 8 Eq. 165; *Morgan* v. *Gronow*, L. R. 16 Eq. 1; *Re Hargreaves*, 43 Ch. D. 401.

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issue of himself or another person (*o*). The mere existence of such a power does not affect the validity of the subsequent limitations. Thus, if a testator gives property upon trust for his daughter for life, with power to appoint a life interest to any husband she may marry, and then upon trust for a class not ascertainable until the determination of the previous trusts, the power is capable of being exercised in favour of a husband born after the testator's death, and, if it is so exercised, the subsequent limitations are bad for remoteness. But if it is not so exercised, the subsequent limitations are good (*p*).

And a trust or power which is unlimited in point of form may be good if an intention appears that it is to be exercised within the period allowed by the Rule (*q*). So if the existence of a collateral power depends on an estate which can be defeated by a tenant in tail, the power is good (*r*).

Where donee is a living person.

A power of appointment given to a living person cannot be void for remoteness, because it must be exercised, if at all, during his lifetime. But it may be inoperative if it is a special power, and if the objects are not ascertainable within due limits of time (*s*). Thus, a power given to A to appoint to his first grandchild who shall be born five years after his death, and shall attain twenty-one, cannot be exercised at all, and is, therefore, ineffectual. And it seems that the efficacy of a power may depend on events which happen after its creation.

Blight v. *Hartnoll.*

In *Blight* v. *Hartnoll* (*t*), a testatrix directed the surplus income of certain landed property to be accumulated for the purpose of paying off the mortgages thereon, and when that had been done, she directed her executors to sell the property and divide the proceeds among such of her grandchildren as might "then be surviving," and in such proportions as C. H. might appoint. C. H. made a will by which she purported to exercise the power in favour of certain grandchildren of the testatrix. When C. H. died, the property was still unsold. Fry, J., held that the appointment was bad, on two independent grounds: first, on the ground that it was made before the property was sold, and, secondly, on the ground that the "gift" was void for remoteness because the class of grandchildren living at the

(*o*) *Routledge* v. *Dorril*, 2 Ves. jun. 357; *Slark* v. *Dakyns*, L. R. 10 Ch. 35. This subject is referred to in the next section, p. 290.

(*p*) *Re Bowles*, [1905] 1 Ch. 371, *post*, p. 330; *Re Davies and Kent's Contract*, [1910] 2 Ch. 35.

(*q*) *Re Lord Sudeley and Baines*, [1894] 1 Ch. 334, *post*, p. 285.

(*r*) See *Briggs* v. *Earl of Oxford*, 1 D. M. & G. 363; *Lantsbery* v. *Collier*, 2 K. & J. 709; *Re Stamford and Warrington*, [1912] 1 Ch. 343.

(*s*) Gray, Perp., § 476. Mr. Gray gives as an example the case of a non-exclusive power to A to appoint to all his grandchildren who are living twenty-five years after his death.

(*t*) 19 Ch. D. 294.

time of the sale could not be ascertained within the limits allowed by the Rule against Perpetuities. But, as Mr. Gray points out (*u*), if the first ground was good, it followed that the power could not be exercised unless the sale took place in the lifetime of C. H., and was therefore not objectionable on the ground of remoteness. Mr. Marsden (*x*) suggests that the trust for sale was itself void for remoteness, although no reference to the point is made in the judgment of Fry, J. It is submitted that the first ground given by Fry, J., is unsound and that the case was rightly decided on the second ground. If, however, the property had been sold during the lifetime of C. H., it seems clear that she might have made a valid appointment to any of the testatrix's grandchildren. If so, it follows that a power of appointment may be effectual or ineffectual according to the events which happen after its creation.

Divisible powers.

A power may be divisible, as regards the donee, so as to be equivalent to two powers, and if one of them is good, it is not affected by the badness of the other. Thus, a power for A or the trustees for the time being of the testator's will to raise a certain sum of money for purposes not necessarily within the proper limits, may be good as to A and bad as to the trustees (*y*).

Re De Sommery.

In *Re De Sommery* (*z*) there was a trust to pay the capital or income of a fund to E. or to apply the capital or income or any part of either for his benefit or for the benefit of his wife or any child or children of his as the trustees might consider desirable. Parker, J., held that there were two powers, first a power of paying capital or income to E. which was only capable of being exercised during his life and was good, secondly a power of applying capital or income for the benefit of E., his wife or children which was capable of being exercised beyond the period allowed by law and was bad.

Limitations in default of appointment under a power which is void for remoteness are good, unless they are themselves obnoxious to the Rule against Perpetuities (*a*).

As to the validity of appointments under powers, see the next section (p. 288).

As to validity of indefinite powers of sale.

Mr. Jarman remarks (*b*) that "at one period it was much doubted whether a power of sale introduced into a deed or will containing limitations in strict settlement, and which was not in

(*u*) Perp., § 476, n.
(*x*) Perp., 238.
(*y*) *Attenborough* v. *Attenborough*, 1 K. & J. 296.
(*z*) [1912] 2 Ch. 622.
(*a*) *Re Abbott*, [1893] 1 Ch. 54.
(*b*) First edition, p. 250.

terms restricted in its exercise to the period allowed by law, was valid. The affirmative has now been decided in several instances (*c*); and in *Boyce* v. *Hanning* (*d*) the same rule was applied where the indefinite power occurred in a settlement containing limitations to A for life, with remainder, subject to a jointure rent charge, to the children of A *in fee*, with a cross executory limitation, in case of any of the children dying under age and without issue. These cases seem to have dispelled the alarm which was created by Lord Eldon's remarks in *Ware* v. *Polhill* (*e*); and it is observable that, in several of the cases referred to, the validity of the power was considered to be so clear, that a title derived under it was forced upon the acceptance of a purchaser. In practice, it often occurs that a sale is made under a will which empowers the testator's trustees, and the survivor and the heirs of the survivor, to sell his real estate (most commonly his copyholds, in order to avoid the necessity of the trustees being admitted previously to a sale), without any restriction in point of time. . . . The manner in which the objection to the validity of indefinite powers of sale in settlements was disposed of in the recent cases, leaves no room for doubt on this point. Indeed, it is observable that, in the early case of *Holder* v. *Preston* (*f*), the Court of King's Bench granted a mandamus to compel the lord of a manor to admit the purchaser of copyholds, claiming under the bargain and sale of trustees of a will, whose power was wholly unrestricted, and the validity of which does not appear to have been called in question."

Cesser of power of sale.

The reason for holding such a power to be valid is not, as is sometimes said, that it facilitates alienation; the true reason is that when, by the death of a tenant for life, or (in the case of a strict settlement of land) by the coming of age of a tenant in fee or in tail, the power is no longer needed, it naturally ceases (*g*). But even where, on the death of a tenant for life, the property becomes absolutely vested in persons *sui juris*, the power of sale is not put an end to if it appears to be the intention of the

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(*c*) *Biddle* v. *Perkins*, 4 Sim. 135; *Powis* v. *Capron*, *ib.* 138, n.; *Wallis* v. *Freestone*, 10 *ib.* 225; *Waring* v. *Coventry*, 1 My. & K. 249; and see 1 Hayes's Introd. (5th ed.), 497; *Cole* v. *Sewell*, 4 D. & War. 32; *Lantsbery* v. *Collier*, 2 K. & J. 709.

(*d*) 2 Cr. & J. 334; see also *Wood* v. *White*, 4 My. & Cr. 482; *Nelson* v. *Callow*, 15 Sim. 353.

(*e*) 11 Ves. 257; as to which, see some observations, 1 Jarm. Pow. 248, n.

(*f*) 2 Wils. 400. "The prudent draughtsman, however, will not allow his confidence in the validity of indefinite powers of sale to induce him to omit an express restriction, confining the power to the period prescribed by the Rule against Perpetuities." [Note by Mr. Jarman.]

(*g*) *Cole* v. *Sewell*, 4 Dr. & War. 32; *Lantsbery* v. *Collier*, 2 K. & J. 709; *Wolley* v. *Jenkins*, 23 Bea. 53; 3 Jur. (N.S.) 321; *Taite* v. *Swinstead*, 26 Bea. 525; *Peters* v. *Lewes & East Grinstead Ry. Co.*, 16 Ch. D. 703; 18 Ch. D. 429.

testator that it should still be exercisable in order to effect a division of the property : such a power is good, because it must be exercised within a reasonable time after the death of the tenant for life, and it can at any time be put an end to by the beneficiaries (*h*). So an unlimited power of sale may be good; if it is intended to be exercised (if at all) within a reasonable time after the testator's death : *e.g.*, to pay debts and legacies (*i*).

Power of leasing.

In *Re Allott* (*k*), there was a power of leasing which might be exercised during the life of a person who might not be in existence at the date of the deed giving the power. It was held that although the life interest given to such person was good, as it must cease on the death of a party to the deed, the power was bad. This decision caused some surprise (*l*) but it seems correct on principle.

Trusts and powers during minorities of tenants in tail.

With regard to the validity of trusts and powers of management and accumulation inserted in strict settlements of land, the following statement, with the accompanying notes, is taken from the third edition of this work, by Messrs. Wolstenholme and Vincent : "In all cases where under a deed or will a strict settlement is created, and (as is usually done) power is given to the trustees during the minority of any person entitled under the settlement to manage and let the property and receive the rents and profits (*m*), or to cut timber and sell it (*n*), and invest the moneys arising thereby in the purchase of other lands to be settled to the same uses, the exercise of these powers must be carefully restricted to the period of the minorities of tenants in tail *by purchase*, else the powers will be altogether void" (*o*).

(*h*) *Re Cotton's Trustees and School Board for London*, 19 Ch. D. 624.

(*i*) *Re Lord Sudeley and Baines*, [1894] 1 Ch. 334; *Re Jump*, [1903] 1 Ch. 129; *Re Dyson and Fowke*, [1896] 2 Ch. 720.

(*k*) [1924] 2 Ch. 498.

(*l*) See an article in 41 L. Q. R. 52.

(*m*) "*Lade* v. *Holford*, 1 W. Bl. 428; Amb. 479; Fearne, C. R. 530, n.; *Browne* v. *Stoughton*, 14 Sim. 369; *Scarisbrick* v. *Skelmersdale*, 17 Sim. 187; *Turvin* v. *Newcome*, 3 K. & J. 16. See also *Floyer* v. *Bankes*, L. R. 8 Eq. 115, where the powers were annexed to an anterior term." *Browne* v. *Stoughton* and *Turvin* v. *Newcome* were approved in *Re Stamford and Warrington*, [1912] 1 Ch. 343.

(*n*) "*Ferrand* v. *Wilson*, 4 Hare, 373."

(*o*) "Mr. Lewis, in the supplement to his work on Perpetuities, doubts the correctness of the decision in *Browne* v. *Stoughton*, conceiving that such trusts are, like executory limitations engrafted on an estate tail, barrable along with the estate tail, and therefore not void for remoteness. But the trustees clearly have an actual estate in the lands, which estate is not subsequent or collateral, but anterior to the estate tail, and the trusts declared cannot therefore be affected by any act of the tenant in tail. This is clear from *Marshall* v. *Holloway*, where there was no term anterior to the estate tail, nor was the destination of the accumulated fund (if made) too remote, being identical with that of the general personalty, the gift of which was held good. The sole ground of the determination therefore was, that the trust for accumulation could not be split or severed, so as to place part

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Trusts for management, etc., of settled land.

The question of the validity of trusts and powers of the nature above referred to has given rise to considerable discussion. It is explained, in another section of this chapter, that where a term vested in trustees is precedent to the estate tail, and is, therefore, not barrable, the trusts annexed to the term will be void for remoteness if they exceed the limits allowed by the Rule against Perpetuities (*p*), and the same principle, of course, applies if the trusts are annexed to a fee simple estate vested in the trustees. It may, however, happen that the trusts are of such a nature that they must necessarily cease to exist if the entail is barred, and it has been suggested that in such a case a different principle ought to be applied. In *Lade* v. *Holford* (*q*), land was devised to trustees to the use of B and his sons in tail in strict settlement, with a proviso directing the trustees, whenever any tenant for life or in tail should be under the age of twenty-six years, to enter and take the rents and profits, and after paying certain sums to apply the residue in the purchase of lands to be settled in the same way: it was held that these trusts were void. In *Browne* v. *Stoughton* (*r*), land was devised to trustees in trust

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before the first estate tail (which would be neither too remote nor barrable), and part after (which would be too remote if it were not barrable). The whole was an entire limitation, and must stand or fall together (see *Pickford* v. *Brown*, 2 K. & J. 426). If in *Browne* v. *Stoughton* the trust had been barrable along with the estate tail, some startling results would follow. Suppose, for instance, that instead of an accumulation being directed during minority, it had been directed during the first twenty-one years after the testator's death to raise money for payment of legacies, it must follow that the tenant in tail, if of full age, could bar the trust, and deprive the legatees of their legacies. The case of *Browne* v. *Stoughton* cannot therefore be distinguished from that of *Lord Southampton* v. *Marquis of Hertford*, 2 V. & B. 54, on the ground that, in the latter, a term was created anterior to the estate tail; indeed, Lord Eldon, in *Marshall* v. *Holloway*, 2 Sw. 445, expressly said that that made no difference. See also 3 Jur. (N.S.) pt. ii, 181. Mr. Sanders, the well-known writer on Uses, went even further than Mr. Lewis: in an opinion of his (Sanders on Uses (5th ed.), p. 203, n.), he says, with respect to *Lord Southampton* v. *Marquis of Hertford*, 'It is not easy to discover the ground of the decision, but it is to be observed that the term of 1,000 years preceded the limitations in tail; and it seems to be inferred that a recovery by tenant in tail, subject to the term, did not destroy the preceding trusts of the term. If this be the case, there is a great fallacy in the inference; for the trusts of a term created for the purposes of a settlement, must follow the ultimate devolution of the inheritance, and not the inheritance the trusts of the term. A recovery by tenant in tail would acquire the fee simple, and render the term attendant on the inheritance discharged of the trusts for accumulation.' The reader will, however, have seen from the decision in *Case* v. *Drosier*, that Mr. Sanders' opinion cannot now be taken as a correct view of the law on this point." (This note, as mentioned above, is taken from the third edition of this work by Messrs. Wolstenholme and Vincent).

(*p*) *Case* v. *Drosier*, 2 Kee. 764; 5 Myl. & Cr. 246; *post*, p. 297; *Lord Southampton* v. *Marquis of Hertford*, 2 V. & B. 54; *Marshall* v. *Holloway*, 2 Swanst. 432. As to the case of *Ferrand* v. *Wilson* (4 Ha. 373), see Farwell on Powers (3rd ed.), p. 126. As to the case of *Lade* v. *Holford* (1 W. Bl. 428), see Fearne, Cont. Rem. 530: Gray, Perp. § 464 (n.).

(*q*) 1 W. Bl. 428.

(*r*) 14 Sim. 369. Followed by Wood, V.-C., in *Turvin* v. *Newcome*, 3 K. & J. 16, and Chatterton, V.-C., in *Cochrane* v. *Cochrane*, 11 L. R. Ir. 361.

for A for life, and on his death in trust for his sons in tail male, with a declaration that so long as any person beneficially entitled in possession should be under twenty-one, the trustees should accumulate the rents and invest the same in the purchase of land to be settled on the same trusts; it was held by Shadwell, V.-C., that the trust was void for remoteness. In *Ferrand* v. *Wilson* (*s*), land was devised to the use of the testator's executors upon the trusts after declared and subject thereto to the use of certain persons and their sons in tail male, and power was given to the executors, until some person entitled to an estate tail or some greater estate attained twenty-one years (*t*), to cut timber and apply the proceeds in the payment of debts and legacies, and the surplus in the purchase of lands to be settled. Wigram, V.-C., held the power to be too remote. In *Floyer* v. *Bankes* (*u*), a power to enter and manage settled estates during minorities was given to the trustees of an overriding term of 500 years, the surplus proceeds to be employed in improving the estates; Romilly, M.R., said the right of entry was clearly too remote.

Again, in *Sykes* v. *Sykes* (*x*), land was settled in tail subject to a term vested in trustees upon trust, in the event of any of the testator's younger sons or their issue becoming seised in possession of the estate by virtue of the will, to raise certain sums: it was held by Wickens, V.-C., on the authority of *Case* v. *Drosier*, that the trust was void for remoteness (*y*). On the other hand,

(*s*) 4 Ha. 344.

(*t*) In the statement of the will (p. 352) the age is given as twenty years, but this is obviously a misprint: see p. 373.

(*u*) L. R. 8 Eq. 115.

(*x*) L. R. 13 Eq. 56.

(*y*) These cases have been much discussed. See Lewis on Perp., Suppl. 174 *seq.*; 3 Jur. (N.S.) (pt. 2) 181; Messrs. Wolstenholme and Vincent's note in the earlier editions of this work, *ante*, p. 285; 3 Davids' Prec. 465, n.; Gray on Perp., § 456 *seq.* It is suggested by Mr. Lewis and Mr. Gray that *Browne* v. *Stoughton* was wrongly decided, because the tenant in tail had a vested interest in the accumulated fund, and that by barring the entail he could put a stop to the accumulation; and Mr. Gray thinks that *Ferrand* v. *Wilson* and *Sykes* v. *Sykes* were wrongly decided, because barring the entail would in *Ferrand* v. *Wilson* have destroyed the power, and in *Sykes* v. *Sykes* have made it impossible to carry the trusts into effect. But I cannot help thinking that there is a certain amount of confusion in the application of the modern Rule against Perpetuities to limitations and trusts annexed to an estate tail. Limitations subsequent to estates tail existed at common law before the modern Rule against Perpetuities was heard of, and no objection could be taken to them on the score of their tending to a perpetuity in the old sense of the term (*ante*, p. 255), because they were always liable to be destroyed by the entail being barred; and the same principle applied to limitations subsequent to or in defeasance of an estate tail created by way of use or trust. In other words, such limitations were not within the mischief which the modern Rule against Perpetuities was invented to prevent. But trusts for management, accumulation, and purchase of lands to be settled, stand on a totally different footing: such trusts do not in any way resemble any estate recognised by the common law; on the contrary, they are an interference with the normal incidents of an estate tail, and their effect may be to alter the interests of persons taking under the settlement at some remote date. As Shadwell, V.-C., said in *Browne* v. *Stoughton*, if

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in *Longfield* v. *Bantry* (*z*), a gift of personal property upon trust to purchase land and settle it on the testator's son in strict settlement, and in the meantime to apply the income in improving other estates settled by the will, "and for the benefit of the inheritance in the said estates, so long as the same shall be enjoyed by my said son or his descendants," was held good, principally, as it seems, on the ground that the trust was of a temporary character. The reason does not appear to be satisfactory, for in applying the Rule against Perpetuities, possibilities, not probabilities, must be regarded.

The correctness of the principle laid down in *Lade* v. *Holford*, *Browne* v. *Stoughton*, and *Sykes* v. *Sykes* is now generally recognised, and powers of management, accumulation, etc., in a strict settlement are therefore always restricted to tenants by purchase (*a*).

Rule against Perpetuities does not apply to accumulations for payment of debts.

The invalidity of such trusts admits, however, of one exception, namely, where the fund arising therefrom is to be applied in discharge of incumbrances affecting the estate (*b*), for then they only prescribe a particular mode of paying the incumbrances which, in case of a mortgage, the incumbrancer himself might adopt by entering into receipt of the rents and profits, and may at any time be put an end to, either by the owner paying the incumbrance, or the incumbrancer enforcing his claim against the *corpus* of the property; thus, there is no restraint on alienation. As the payment of all the debts of a testator can now be enforced out of his real as well as his personal estate, there seems, on the principle above noticed, no reason at the present day to doubt the validity of a trust for the accumulation for any period, however long, of the income of all or any part of a testator's property, whether real or personal, for the purpose of paying his debts (*c*).

Appointee under a special power must be competent to have taken immediately from the donor.

(C) APPOINTMENTS UNDER POWERS.—Mr. Jarman remarks (*d*) that "in the case of appointments, testamentary or otherwise,

there were a succession of minorities, the trusts might continue for an indefinite time. They are, therefore, within the mischief of the modern Rule against Perpetuities, and are void unless restricted within its limits. [Note by C. Sweet.]

(*z*) 15 L. R. Ir. 101.

(*a*) 3 Davids, Conv. 464.

(*b*) *Lord Southampton* v. *Marquis of Hertford*, 2 V. & B. 54, see p. 65; *Bateman* v. *Hotchkin*, 10 Bea. 426; *Briggs* v. *Earl of Oxford*, 1 D. M. & G. 363, and see *Bacon* v. *Proctor*, T. & R. 40. In the two first cited cases there was a preceding term, so that it is absolutely necessary to refer them to this special ground. See also *Gilbertson* v. *Richards*, 5 H. & N. 453, and the observations of Kay, J., and Jessel, M.R., thereon in *London & South Western Ry. Co.* v. *Gomm*, 20 Ch. D., at pp. 573, 577, citing Sugd. Pow. (8th ed.), p. 16.

(*c*) *Tewart* v. *Lawson*, L. R. 18 Eq. 490.

(*d*) First edition, p. 248.

under powers of selection or distribution in favour of defined classes of objects, the appointees must be persons competent to have taken directly under the deed or will creating the power (*e*). The test, therefore, by which the validity of every such gift must be tried is, to read it as inserted in the deed or will creating the power, in the place of the power. Attention is often called to this doctrine in practice, where a power having been reserved by an ante-nuptial settlement to one or both of the marrying parties, to appoint an estate or fund among the issue generally of the marriage, the donee wishes to exercise it by making a settlement of the property on the children of the marriage for life, with remainder to their children or issue; this, it is obvious, cannot be done; for, as the grandchildren of the marrying persons could not have been made objects of gift immediately under the limitations of the settlement, since they do not (like children) necessarily come *in esse* during the lives of either of the parties then in being, they cannot take under the appointment founded on such settlement (*f*). In order to bring

(*e*) *Crompe* v. *Barrow*, 4 Ves. 681; *Robinson* v. *Hardcastle*, 2 T. R. 241, 380, 781. Similarly where a post-nuptial settlement is made in pursuance of an agreement on marriage, the date of the agreement, not of the settlement, must be considered on the question of perpetuity: *Cooke* v. *Cooke*, 38 Ch. D. 202. In *Brudenell* v. *Elwes*, 1 East, 442, the appointment was void for excess, not for remoteness or perpetuity.

(*f*) *Bristow* v. *Warde*, 2 Ves. jun. 336; *Crompe* v. *Barrow*, 4 Ves. 681. See also *Robinson* v. *Hardcastle*, 2 T. R. 241, 380, 781; *Re Brown and Sibly*, 3 Ch. D. 156; *Re Warren's Trusts*, 26 Ch. D. 208. See also *Re McCormick*, [1915] 1 Ir. R. 315. The decision in *Hutchinson* v. *Tottenham*, [1898] 1 Ir. R. 403, is criticised by Mr. Gray, 404, n. The cases of *D'Abbadie* v. *Bizoin*, Ir. R. 5 Eq. 205, and *Whitby* v. *Mitchell*, 44 Ch. D. 85, rest on a different principle: the appointments in these cases were void under the old Rule against Perpetuities, *ante*, p. 253.

The first edition of this work contained the following note by Mr. Jarman: "It frequently happens that a parent, having a power of appointment, is desirous, on the marriage of a child, one of the objects of the power, to make a settlement in favour of such child, and also of the intended husband or wife, and the issue of the marriage. The purpose may be accomplished, if the child is of age and the power authorises an appointment by deed, by making an absolute appointment in favour of the child; who then, by the same (or more usually by a separate) deed, settles the appointed property upon the several objects of the intended marriage, and in such case it is conceived that, even if it could be shown that the appointment was made with the express previous understanding that it should be followed by such a settlement, the validity of the appointment would not be affected; though equity certainly is very jealous of all such transactions, and if there is any previous contract for benefiting the donee himself, even though only extending to a loan of the appointed sum, the appointment would clearly be bad. Of course it is desirable, even in making such a settlement as is above suggested, to avoid showing that it was the result of a previous arrangement between the appointor and appointee. If the marrying child is a minor, the appointment might be made in favour of any other child, being adult, who would then make the intended settlement. Where the power in question is exercisable by will only, the donee's desire to embrace the issue of the appointee, or any other persons who are not objects of the power, of course cannot be attained by any such means; and the nearest approach which can be made to the scheme is, in the first instance, to appoint the property to the child absolutely, and then, to enjoin him to execute the desired settle-

the appointment within the prescribed limit, it must be confined to such issue as shall be born in the lifetime of the marrying parties, or one of them, or of some other person living at the time of the execution of the settlement, and during the period (as the case of *Cadell* v. *Palmer* allows us to say (*g*)) of twenty-one years afterwards, unless the vesting is postponed (as it commonly is) to majority, which would absorb the twenty-one years; and even in regard to the children of the marriage, the vesting of the shares must not be protracted beyond the decease of the surviving parent, and the attainment of majority" (*h*), or beyond the period of twenty-one years from the decease of the surviving parent.

Limits of the principle.

But Mr. Jarman's test requires some qualification, for "it is not meant that the precise language of the instrument exercising the power is to be read into the instrument creating it" (*i*). If the appointment is made by will, it does not, owing to the ambulatory nature of the instrument, take effect until the testator s death, and it follows that the persons intended to take under the appointment are not ascertained until that time. Thus under a power to appoint to the testator's issue, an appointment to A, a daughter of the testator, for life, and after her death to her next-of-kin, is good if A is born in the testator's lifetime, and if her next-of-kin are issue of the testator (*k*). In a case in which a question of this nature arose, the testator gave property upon such trusts for the benefit of C. T. and his present and future issue as A. B. should appoint; A. B. by her will appointed it in trust for C. T. for life, and after his death for all his children who had attained or should attain twenty-five if born in her lifetime, or twenty-one if born after her decease. All of C. T.'s children attained twenty-five before A. B.'s death. It was held that upon the appointment taking effect, namely, at A. B.'s death, the shares of the appointees were vested and ascertained, and that the apportionment was therefore good (*l*).

Re Thompson.

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ment of the appointed property; and, as an inducement to his doing so, to make it the condition of some *other* benefit which he is to derive under the will." Some caution should be observed before adopting the suggestion of Mr. Jarman that on the marriage of a minor an appointment under a power to appoint to children might be made to an adult child who would then settle the fund. See *Pryor* v. *Pryor*, 2 De G. J. & S. 205; *Birley* v. *Birley*, 25 Bea. 299; and see *Re Turner's Settled Estates*, 28 Ch. D. 205, at pp. 216, 217. [Note by Mr. Robbins in the fifth edition of this work.]

(*g*) It will be remembered that the exact terms of the modern Rule against Perpetuities were not settled until the decision in *Cadell* v. *Palmer*, in 1833. The first edition of Mr. Jarman's book was published in 1844.

(*h*) *Massey* v. *Barton*, 7 Ir. Eq. 95.

(*i*) *Per* Joyce, J., in *Re Thompson*, [1906] 2 Ch. 199.

(*k*) *Re Coulman*, 30 Ch. D. 186.

(*l*) *Re Thompson, supra.*

This principle seems to have been overlooked in *Re Wright* (*m*), which is criticised in *Re Paul*, [1921] 2 Ch. 1.

Effect of power and appointment, or one of them, embracing too wide a range of objects.

Where a power does in terms authorise an appointment to issue only who are born within due limits, an appointment to a more extensive range of issue would be totally void if made to the whole as a class to take as tenants in common, for the shares of the issue who are within the line could not be ascertained (*n*). But in the converse case, *viz.*, that of the power embracing issue generally and the appointment being duly restricted to issue within the prescribed boundary, there can be no doubt that the appointment would be good (*o*). If the power and appointment both embrace too wide a range of objects, and the appointment is made to the children or issue as a class, it will, according to the general principle before adverted to, be void *in toto*, as well as to members of the class who are within, as to those who are not within, the line (*p*).

Separate and severable appointments.

If, however, a separate sum is appointed to each member of the class independently of the others, the appointment is good as to those who come within the limits allowed by the rule, and bad as to the others (*q*). And if the power and the appointment are so limited that the shares of all the appointees can be ascertained within the proper limits, no question of remoteness arises; the appointment is good as to the appointees who are objects of the power, and void as to the others (*r*). In *Re Farncombe's Trusts* (*s*), A had a power to appoint to her issue, "such issue to be born before any such appointment"; A by deed appointed to her daughter B for life and after her death to her children, at twenty-one, with a clause of accruer; at the date of the appointment B had three children living, and she had three born afterwards; one of the children attained twenty-one after the death of B; the rest were minors: it was held by Hall, V.-C., that the appointment was good as to the three

(*m*) [1906] 2 Ch. 288. According to a note in the Law Quarterly Review (xxiii 9), the invalidity of the limitations in this case resulted from a number of complicated provisions not referred to in the report.

(*n*) In the first edition Mr. Jarman stated that such an appointment would be good *pro tanto*, on the ground that "as the issue who are beyond the line are also strangers to the power, the instrument would be simply nugatory *quoad* the shares of the remote appointees." But this opinion is clearly unsound, for the reason given in the text. See the third edition of this work, p. 272; Gray on Perp., § 538.

(*o*) *Attenborough* v. *Attenborough*, 1 K. & J. 296; *Slark* v. *Dakyns*, L. R. 10 Ch. 35.

(*p*) *Routledge* v. *Dorril*, 2 Ves. jun. 357; *Thomas* v. *Thomas*, 14 Sim. 234.

(*q*) *Wilkinson* v. *Duncan*, 30 Bea. 111 (better reported in 7 Jur. (N.S.) 1182); *Re Hallinan's Trusts*, [1904] 1 Ir. R. 452. In *Von Brockdorff* v. *Malcolm*, 30 Ch. D. 172, Pearson, J., professed to follow *Wilkinson* v. *Duncan*, but the two cases rest on different principles. See *post*, p. 304.

(*r*) *Harvey* v. *Stracey*, 1 Dr. 136; Sugden on Powers, 507.

(*s*) 9 Ch. D. 652; *Re Witty*, [1913] 2 Ch. 666.

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children of B living at the date of the appointment, and that the share of each of them would be determined by the number of all the children who attained twenty-one; consequently, if all attained twenty-one, each of the three children who were objects of the power would take one-sixth.

In *Davy* v. *Clarke* (*t*) a testator devised his lands to A for life and after his death to any son or sons "as he shall deem most deserving and attaining the age of 25 years." A had issue three sons, B, C and D all born before the testator's death. A by his will appointed the lands to his sons C and D, and to the eldest son of B. This was held a good appointment so far as C and D were concerned, as they were both living when the power was created and had both attained twenty-five when the power took effect.

Unborn child.

Again, although under a special power to appoint to children, a life estate may (as we have seen) be limited to a child unborn at the time of the creation of the power, the limitation to such child of a power to appoint by will would be void, since it would tie up the property until the death of the unborn child (*u*). But such a power may be limited to a child born at the time of the creation of the power (*x*). And the limitation of a power to appoint by deed or will would be valid even in the case of a child unborn at the time of the creation of the original power, since a power to appoint by deed or will confers an absolute and immediate power of disposition (*y*), although it would be void if a condition precedent (not necessarily to be fulfilled within the limits) were attached to it (*z*). A determinable life interest, however, may be appointed to an unborn child (*a*). So, an appointment to a child (unborn at the creation of the power) for life, with remainder to his executors or administrators as part of his personal estate, is good (*b*). The validity of limitations to unborn persons is discussed below, pp. 322 *et seq.*; many of the cases there cited arose on appointments under special powers.

Appointment to an unknown class.

In *Blight* v. *Hartnoll* (*c*), Fry, J., laid down the rule that where a person has power to appoint among a class, he must know the class at the time he exercises the power; if, for example,

(*t*) [1920] 1 Ir. R. 137.

(*u*) *Wollaston* v. *King*, L. R. 8 Eq. 165; *Morgan* v. *Gronow*, L. R. 16 Eq. 1; *Hutchinson* v. *Tottenham*, [1898] 1 Ir. R. 403; *Tredennick* v. *Tredennick*, [1900] 1 Ir. R. 354. Apart from remoteness, such a limitation would be within the original power: *Slark* v. *Dakyns*, L. R. 10 Ch. 35.

(*x*) *Phipson* v. *Turner*, 9 Sim. 227; *Slark* v. *Dakyns*, *supra*.

(*y*) *Bray* v. *Hammersley*, 3 Sim. 513; *S. C. nom. Bray* v. *Bree*, 2 Cl. & F. 453; *Re Meredith's Trusts*, 3 Ch. D. 757; Farwell on Powers (3rd ed.), p. 334.

(*z*) *Webb* v. *Sadler*, *infra*; *Morgan* v. *Gronow*, L. R. 16 Eq. 1.

(*a*) *Wainwright* v. *Miller*, [1897] 2 Ch. 255; *Re Gage*, [1898] 1 Ch. 498.

(*b*) *Webb* v. *Sadler*, L. R. 8 Ch. 419.

(*c*) 19 Ch. D. 294, stated above, p. 282.

A had power to appoint among his children who should be living at the return of B from Rome, and the power were exercised by A before B returned from Rome, Fry, J., thought that that would be a bad exercise of the power. But there seems to be no foundation for this doctrine (*d*), and in *Re Coulman* (*e*), where A had a power to appoint to issue, and she appointed to an object of the power for life, with remainder to his next-of-kin, Pearson, J., said: "To my mind there is no reason why they [the next-of-kin] should not take if at the time when the tenant for life dies his next-of-kin happen to be issue," that is, objects of the power. "The question," he said, "is a very curious one."

Appointment by reference.

An appointment may be made by reference. And accordingly, if under a special power a testator appoints to the uses or trusts of an existing deed, "or such of them as are capable of taking effect," the phrase "capable of taking effect" may be construed as meaning what the law allows to take effect, so that if some of the uses or trusts fail by reason of the Rule against Perpetuities being infringed, they may be treated as excluded from the appointment (*f*).

Absolute appointment followed by qualifications void for remoteness.

The doctrine that where a gift is absolute in the first instance, and is followed by qualifications or restrictions which are void for remoteness, the original gift prevails, applies to appointments under powers. In fact, many of the leading cases on the doctrine are cases of appointments (*g*).

Under general powers time is computed from the appointment.

The test of the validity of appointments under special powers above alluded to is, of course, not applicable to appointments under general powers, because such powers are, in point of alienation, equivalent to absolute ownership; the donee can dispose of the property as he pleases. It follows that the period for the commencement of limitations under such appointments in point of remoteness is the time of the execution of the power, and not of the creation of it. And it has been held that the same principle applies where the power, though general in its objects, is to be exercised by will only, in which case the period allowed by the Rule will run from the testator's death (*h*).

(*d*) Farwell, Powers (3rd ed.), p. 168.

(*e*) 30 Ch. D. 186.

(*f*) *Re Finch and Chew's Contract*, [1903] 2 Ch. 486.

(*g*) *Post*, p. 336. *Cooke* v. *Cooke*, 38 Ch. D. 202, and *Re Boyd*, 63 L. T. 92, are recent cases on the subject, in which the earlier authorities are cited. See also *Hutchinson* v. *Tottenham*, [1898] 1 Ir. R. 403.

(*h*) By Chitty, J., in *Rous* v. *Jackson*, 29 Ch. D. 521, followed by North, J., in *Re Flower*, 55 L. J. Ch. 200 (disapproving *Re Powell's Trust*, 39 L. J. Ch. 188), and in *Stuart* v. *Babington*, 27 L. R. Ir. 551; Mr. Gray, however, thinks that the principle laid down in *Re Powell's Trusts* is correct (Gray on Perp., § 526 *seq.*).

CHAPTER X.

An executory limitation to arise on an indefinite failure of issue, void.

Exception where previous gift fails.

(D) LIMITATIONS AFTER FAILURE OF ISSUE.—An executory limitation to arise on an indefinite failure of issue (*i*) of any person living or dead is, of course, void for remoteness (*k*).

This rule, however, does not apply if the original gift itself fails to take effect on the death of the testator. Thus, if leaseholds were, before 1926, bequeathed to A for life, with remainder to his sons in tail, with remainder to B in tail, and A die without issue during the lifetime of the testator, the gift to B was good, and gave him an absolute interest in the leaseholds. If A were to survive the testator, the gift over to B would have been absolutely bad (*l*).

Exception in case of executory devise engrafted on an estate tail.

In the case of real estate, moreover, if an executory devise is so limited that it must necessarily take effect either during the continuance, or immediately after the determination, of an estate tail, it will be good, because the power which resides in the owner of that estate to destroy all posterior limitations, executory as well as vested, takes the case out of the mischief which the Rule against Perpetuities was designed to prevent (*m*). Thus, if a person, by deed or will, creates an estate tail, and annexes to it a proviso divesting the estate in favour of another in case the devisee, or his issue in tail, should at any time thereafter neglect to assume the name and bear the arms of the testator, or in case another property should at any future time devolve to him or them, or on any other such event : this executory limitation, though it would have been clearly void if engrafted on an estate in fee simple, is good as applied to an estate tail (*n*). So a trust for sale and division of the proceeds, to take effect on the failure of an estate tail, is good (*o*).

(*i*) It will be remembered that under section 29 of the Wills Act, words importing an indefinite failure of issue of A *prima facie* mean a failure of issue during the lifetime or at the time of the death of A. See *post*, p. 1914. Even under the old law a gift in default of issue might bear a restricted meaning, so as to avoid any question of remoteness : *Murray* v. *Addenbrook*, 4 Russ. 407.

(*k*) *Badger* v. *Lloyd*, 1 Salk. 232; *Moore* v. *Parker*, 1 Ld. Raym. 37; *Lady Lanesborough* v. *Fox*, Ca. t. Talb. 262; *Att.-Gen.* v. *Hird*, 1 B. C. C. 170; *Lepine* v. *Ferard*, 2 R. & My. 378; *Carter* v. *Bentall*, 2 Bea. 551; *Harding* v. *Nott*, 7 E. & B. 650; *Webster* v. *Parr*, 26 Bea. 236.

(*l*) *Re Lowman*, [1895] 2 Ch. 348, following *Brown* v. *Higgs*, 4 Ves. 708; *Donn* v. *Penny*, 1 Mer. 20; *Mackinnon* v. *Peach*, 2 Keen, 555; and *Williams* v. *Lewis*, 6 H. L. C. 1013, and overruling *Harris* v. *Davis*, 1 Coll. 416; *Hughes* v. *Ellis*, 20 Bea. 193; and *Greated* v. *Greated*, 26 Bea. 621. The doctrine established by these decisions is referred to *post*, pp. 427, 538.

(*m*) *Gulliver* v. *Ashby*, 4 Burr. 1929; *Att.-Gen.* v. *Milner*, 3 Atk. 112; as to a charge subsequent to an estate tail, *Goodwin* v. *Clark*, 1 Lev. 35; *Faulkner* v. *Daniel*, 3 Hare, 199; *Morse* v. *Ormonde*, 1 Russ. 382; *Bristow* v. *Boothby*, 2 S. & St. 465.

(*n*) *Nicolls* v. *Sheffield*, 2 Br. C. C. 215; *Carr* v. *Earl of Erroll*, 6 East, 58; *Earl of Scarborough* v. *Doe* d. *Savile*, 3 Ad. & Ell. 897; *Bennett* v. *Bennett*, 2 Dr. & Sm. 266.

(*o*) *Heasman* v. *Pearse*, L. R. 7 Ch. 275.

Re Haygarth.

In *Re Haygarth* (*p*) the testator devised real estate to trustees upon trust to pay the rents to his brother for life, and, after his death, in trust for the first and other sons of his brother successively in tail, with remainder in trust for the first and other daughters of his brother successively in tail, and if the trust for his brother and his issue in tail should cease or determine, then the testator directed his trustees on such failure or determination to sell his real estate and to hold the proceeds upon trust for such of the testator's five cousins (named) as should be living when the said direction or sale should come into operation (each share to be retained upon the usual trusts of a settled share for each cousin for life and after his death for his or her children); provided that if any of his said five cousins should die before the aforesaid direction for sale should come into operation leaving a child or children living when such direction should come into operation, who being male should attain twenty-one or being female should attain twenty-one or marry, this last-mentioned child or children should take, and if more than one, equally between them the share to which his, her, or their parent would have been entitled for life if such parent had not died before the direction for sale had come into operation. The testator's brother died without issue. Three of the five cousins had died before the brother's death, one of them having an infant child. Joyce, J., held that since, even if the persons to take and their shares were not definitely ascertained on or before the determination of the estate tail, yet as they must be definitely ascertained within a life in being and twenty-one years from the death of the testator, the limitations were valid and not void for remoteness.

Equitable estates tail.

The rule above stated applies not only to legal but also to equitable estates tail, because the latter can be barred in the same way as if they were legal, and after 1926 it applies to entailed interests in personalty.

Distinction as to legal contingent remainders.

If, however, the event on which a limitation after an estate tail is to take effect may not happen until after the estate tail has determined, there is a difference between a legal contingent remainder on the one hand (*pp*), and an equitable contingent remainder or an executory devise on the other. For if the limitation is equitable or executory, so that there may be an interval during which it is indestructible, it is void *ab initio* (*q*). If, on the other hand, the limitation after the estate tail is a

(*p*) [1912] 1 Ch. 510.

(*pp*) It will be remembered that legal contingent remainders ceased on January 1, 1926.

(*q*) Gray, § 451, citing *Hartopp* v. *Carbery*, 1 Sand. Uses, 205 (rent-charge limited by way of use). See *Bankes* v. *Holme*, 1 Russ. 394, n., *post*, p. 299; *Abbiss* v. *Burney*, 17 Ch. D. 211.

legal contingent remainder, the remoteness of the event upon which it is to vest is immaterial, since it is always barrable as long as the estate tail continues; and if, being unbarred, it is not vested when the latter determines, it fails for want of a particular estate. Thus, in *Jack* v. *Fetherstone* (*r*), estates were limited by settlement to T. S. W. for life, with remainder to his first and other sons in tail male, and for default of such issue male, and in case of issue female only of T. S. W., to T. S. W. in fee, and in case of failure of issue of T. S. W., then further limitations were made. It was argued that the ultimate limitations being deferred till a general failure of issue of T. S. W., while previous estates were limited to his issue male only, were too remote; but Bushe, C.J., said that this objection was in some degree founded on a misapprehension of Mr. Fearne's meaning, and in not distinguishing the limitation from the event: the event might be such that it might happen either before or after the future estate was to vest, and yet the possibility that it might happen after did not affect the nature of the limitation. So that the remoteness of the event is immaterial, if the estate is not too remote.

A remainder may be good though limited upon an event too remote.

Cole v. *Sewell.*

In *Cole* v. *Sewell* (*s*), the same question arose as to the validity of estates limited by deed, to take effect in case of a general failure of issue, by way of remainder after previous estates tail limited to some only of such issue. Lord St. Leonards (then L. C. Ir.) held the remainder to be good.

This decision was affirmed in the House of Lords (*t*). Lord Cottenham observed: "It is said that this last limitation is too remote, because, there being no previous limitation to issue generally, there might be a failure of all the prior limitations, and yet issue, as in the case of a son of a daughter, might exist, so that this last limitation would not take effect. But if this be a remainder, it would be barrable, and the objection, therefore, would not arise." He then went on to show that the limitation in question was a remainder limited on a contingency, and therefore good.

Doe v. *Perratt.*

So in *Doe* d. *Winter* v. *Perratt* (*u*), where the devise was to I. C. in tail male, with remainder to the first male heir of the branch of R. C.'s family who lived at H., the branch of R. C.'s family who lived at H. might have consisted for an indefinite time of females only; so that the gift to the first male heir who should come into existence was too remote, had it not been

(*r*) 2 Huds. & Br. 320.
(*s*) 4 D. & War. 1, corrected by the Judge himself, and differing in some material passages from 2 Con. & L. 344.
(*t*) 2 H. L. C. 186.
(*u*) 9 Cl. & Fin. 606.

limited by way of contingent remainder; but being so limited, no doubt of its validity was expressed on this ground; the only question was, who was meant by "first male heir."

Term of years, whether ulterior or precedent to estate tail.

A term of years (like any other estate) may be made expectant by way of remainder on an estate tail; but sometimes it happens that the term is so limited as to render it hard to say whether it is ulterior or precedent to the estate tail. If the term is precedent to the estate tail, of course it cannot be defeated by the acts of the tenant in tail (*x*): and in such case, if the trusts of the term are not to arise until the failure of issue under the entail, those trusts are necessarily void. As in *Case* v. *Drosier* (*y*), where a testator devised his estates at M. and T. to trustees for 500 years, upon the trusts after declared, and he then devised the M. estate, subject to the term, to A for life, with remainder to his sons and daughters in tail, in strict settlement, in the usual manner, with remainder to B and his sons and daughters in like manner. He then devised the T. estate in a similar manner, except that B was put in the place of A. And the testator declared the trusts of the term of 500 years to be for the purpose (among others) of raising portions for two granddaughters, payable at twenty-one, and further portions, in case either A or B should die without issue, and all which were to sink in case they died under age and unmarried. Lord Langdale, M.R., thought that the words "without issue" meant without issue who were objects of the prior limitations; but as this might be a remote event, and as there were no means by which the charges could be barred, the trusts could not be supported. "They depend," he observed, "on a term, and that term is precedent to the estates tail, so that after a recovery there would remain a term and a trust to be performed: a trust which could not be defeated, and a term which cannot be destroyed."

Case v. *Drosier.*

Of course, it is not the mere limitation of an estate tail—as, to the first son of A, who never has a son—but the vesting of it in the devisee, which protects the trusts of the subsequent term. On the death of A without having had a son, the trusts will be good or bad or (if severable) some good and some bad, according as they are within or without the limits set by the Rule against Perpetuities (*z*).

(*x*) *Eales* v. *Conn*, 4 Sim. 65.

(*y*) 2 Kee. 764, affirmed by Lord Cottenham, 5 My. & Cr. 246. See *Sykes* v. *Sykes*, L. R. 13 Eq. 56, *ante*, p. 287, and see Hayes's Introd., vol. 1, p. 135, vol. 2, p. 170, n. (5th ed.).

(*z*) *Tregonwell* v. *Sydenham*, 3 Dow, 194, where all the trusts were held void except the trust to raise the money, and the money was held to result to the heir. See as to this case (which is somewhat obscure), Marsden, Perp., 136; Gray, § 419 *seq*, *ante*, p. 281.

CHAPTER X.

Executory limitation, whether precedent or subsequent.

The question whether an executory limitation was precedent or subsequent to an estate tail, was much discussed in *Doe* d. *Lumley* v. *Earl of Scarborough* (*a*), where lands were devised to A for life, with remainder to his first and other sons in tail, remainders over, with a proviso that if the earldom of S. should descend upon A or any of his sons, within the period of certain lives, or within the term of twenty-one years after the decease of the survivor, his or their estate should cease, and the lands remain over as if he or they were dead without issue. The eldest son of A suffered a common recovery, and A joined in the conveyance for the purpose of making a tenant to the *præcipe*. The earldom afterwards devolved upon A. It was held in the Exchequer Chamber (*b*) (reversing a decision in B. R.), that the executory limitation was barred; the Court being of opinion that this was a mere proviso for the cesser of the old estates created by the will to which it applied, so as to accelerate and let in the enjoyment of the remainders over, and not (as had been considered in the Court below) the creation of any new estate. The Judges in B. R. were of opinion that the proviso operated, not by way of determining or defeating the estate tail of the son of A, but antecedently to that estate, by preventing the estate tail from ever taking effect; and that the persons entitled in remainder had two distinct estates, one of which was antecedent, and the other posterior to the estate tail, and consequently, that the former could not be affected by the recovery.

The question of the validity of trusts and powers to take effect during a strict settlement of land has been already discussed (*c*).

A devise of a reversion may be void when a similar devise of a remainder would be good.

The devise of an estate in reversion may, it seems, be void for remoteness when a devise of an estate in remainder would not (*d*). A reversion is, in fact, a present interest, since it carries the services and rent (if any) during the subsistence of the particular estate (*e*); and a devise of it, therefore, contingently on a future event is, like a similar devise of any other estate in possession, an executory limitation which need not vest *eo instanti* that the particular estate determines, and is void if the

(*a*) 3 Ad. & Ell. 2, 897; *Milbank* v. *Vane*, [1893] 3 Ch. 79.
(*b*) 3 Ad. & Ell. 897.
(*c*) *Ante*, p. 286.
(*d*) This paragraph is an addition to Mr. Jarman's text by Messrs. Wolstenholme and Vincent, and is taken verbatim from the third edition of this work. The special rule as to the vesting of devises of reversions and remainders is treated of in Chap. XXXVII.
(*e*) Preston on Merger, 246; *Badger* v. *Lloyd*, 1 Ld. Raym. 523; Bac. Uses, 45, 46, cited Sand. Uses, Ch. 2, v. 2.

event be too remote. Thus, in *Bankes* v. *Holme* (*f*), where a settlor, having the reversion in fee expectant on a failure of issue male of his sons and issue general of his daughters, devised it on the contingency of there being no child or children of his wife by him begotten, or (as eventually happened), there being such, all of them should die without issue; it was held that the devise was too remote and void (*g*). If the devise in this case had been such as to create a remainder in fee, such remainder could only have taken effect in case the general failure of issue had happened simultaneously with the determination of the estates tail to the sons and daughters (*h*), and up to that time would have been barrable, and therefore not too remote. The devise of the reversion, on the other hand, though barrable during the subsistence of the estates tail, would not necessarily have always been barrable, since, taking effect as it did by way of executory devise, it must, if held valid, have awaited the time when the issue general failed; an indefinitely long period might thus elapse between the determination of the estates tail and the failure of issue general, during which the reversion would have descended in fee to the testator's heir, who could not have barred the executory gift, and the rule against perpetuity would have been infringed (*i*).

Equitable contingent remainders.

Equitable contingent remainders in land are not governed by the same rule as contingent remainders of legal estates; for they do not necessarily vest or fail upon the determination of the previous estate, but await the happening of the contingency on which they are limited (*k*), and are, therefore, invalid if that contingency be too remote (*l*). But, like executory devises, they are good after an estate tail, if limited on an event which must necessarily happen at or before the determination of that estate,

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(*f*) 1 Russ. 394, n.; Sugd. Law of Prop. 351; and see *Doe* v. *Fonnereau*, Dougl. 487; and see the remarks on *Bankes* v. *Holme*, *post*, p. 1937.

(*g*) See *Lewis* v. *Templer*, 33 Bea. 625, where a trust for sale on failure of the issue of A generally was held, by reference to a settlement, to mean failure of issue living at A's death, and to be valid. It is possible that the devise in *Bankes* v. *Holme* might have been upheld on this ground.

(*h*) The case would then have been similar to *Cole* v. *Sewell*.

(*i*) *Bristow* v. *Boothby*, 2 S. & St. 465; and see *Morse* v. *Ormonde*, 1 Russ. 382.

(*k*) *Hopkins* v. *Hopkins*, Ca. t. Talb. 44; 1 Atk. 581; West, 606: *Chapman* v. *Blisset*, Ca. t. Talb. 150.

(*l*) *Monypenny* v. *Dering*, 7 Hare, 568, 590. See *Astley* v. *Micklethwait*, 15 Ch. D. 59, where the testator had only the equity of redemption in part of his lands, and the remainder, being within due limits, was saved as regards that part by the legal estate outstanding in the mortgagees: and *Abbiss* v. *Burney*, 17 Ch. D. 211, where the devise was to trustees during the life of A, and at his death to convey to such son of B (a person who survived testator) as should first attain twenty-five, and the remainder was held void.

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as in the case of a trust for a class to be ascertained at or before such determination (*m*).

Personal property.

Before 1926 a gift of personal property to a person in tail gave him, as is well known, an absolute interest. The result of this rule may be to make a gift valid which would otherwise be too remote. In *Re Lowman* (*n*), a testator gave personalty to A for life, with remainder to his first and other sons in tail male, with remainder to the first and other sons of B, a spinster, in tail male, with remainder to the first and other sons of C, a spinster, in tail male, with remainder to the first son of D, a married woman, in tail male, and in default of such issue to the second and other sons of D in tail male; A, B, C, and D survived the testator; A and C died unmarried; B was past the age of child-bearing; D had had two sons, the elder of whom died before the testator : it was held that the gift to the second son on failure of issue of the first son was not void for remoteness.

Class not to be ascertained within due limits.

(E) GIFTS TO CLASSES.—A gift to a class of persons is void if the time at which the class is to be ascertained is not within the period allowed by the Rule (*o*). Thus, in *Lett* v. *Randall* (*p*), the testator gave his residuary estate to his children in equal shares, with a proviso that if any of his daughters should marry, and die in her husband's lifetime, her share should go to her husband for life, and after his decease to the children of his daughter " then living " : it was held that, as the husband of any daughter might be a person not in existence at the testator's death, the class to take on the husband's death would not necessarily be ascertained within due limits, and that the gift to the children of the daughters was void for remoteness. So, in *Re Gage* (*q*), a gift to a class including such of a number of unborn persons as should marry, was held void for remoteness.

A gift to such of a number of persons living at the death of the testator as shall be living at the end of thirty years is good (*r*).

Posthumous child.

It has been already mentioned that a child *en ventre sa mère*

(*m*) *Morse* v. *Ormonde*, 1 Russ. 382; *Heasman* v. *Pearse*, L. R. 7 Ch. 275.

(*n*) [1895] 2 Ch. 348. On the question of B being past the age of child-bearing, see *Re Hocking*, [1898] 2 Ch. 567; *Re White*, [1901] 1 Ch. 570.

(*o*) As to what constitutes a "class," see below, p. 307 and 409. As to powers to appoint to a class, see *ante*, p. 292. As to the period of vesting, see *Re Hume*, [1912] 1 Ch. 693, *post*, p. 1388; *Re Lodwig*, [1916] 2 Ch. 26, *post*, p. 1362.

(*p*) 3 Sm. & G. 83; *Buchanan* v. *Harrison*, 1 J. & H. 665; *Re Merricks' Trusts*, L. R. 1 Eq. 551; *Gooch* v. *Gooch*, 3 D. M. & G. 366.

(*q*) [1898] 1 Ch. 498. See also *Re Crichton's Settlement*, 106 L. T. 588.

(*r*) *Lachlan* v. *Reynolds*, 9 Ha. 796.

is, for the purposes of the Rule, considered to be a living person (*s*).

Gifts to classes of unborn persons.

"The most frequent instances of the transgression of the Rule against Perpetuities," as Mr. Jarman remarks (*t*), "occur in devises or bequests to classes comprising either individuals who may not come into existence at all during a life in being and twenty-one years afterwards, or persons who may not be *in esse* at the death of the testator, and the vesting of whose shares is postponed beyond majority. In the former case the Rule is fatally violated, even though the gift to the unborn objects is so framed as to confer on them vested interests immediately on their birth."

An example of the latter kind is supplied by the case of *Dodd* v. *Wake* (*u*), where a testator bequeathed a sum of £8,000 unto and amongst the children of his daughter M. M. "who shall be living at the time the eldest shall live to attain the age of twenty-four years, and the issue of such of the children of my said daughter as may then happen to be dead leaving issue," *per stirpes* and not *per capita*, as tenants in common, and to be paid as and when they should attain twenty-four, but without interest in the meantime. M. M. had three children living at the testator's death; but the question was, whether the bequest was not void for remoteness, inasmuch as all these children might die under twenty-four, and then the legacy could not vest in any child, until the expiration of twenty-four years and upwards after the testator's decease. Sir L. Shadwell said: "The testator appears clearly to have intended that only those children of his daughter should take who should be alive when the eldest child for the time being should attain the age of twenty-four, and therefore the bequest is void for remoteness."

Distinction in regard to remainders.

"It is proper to remark," says Mr. Jarman (*x*), "that, in the class of cases under consideration, a limitation which would as an executory devise be void for remoteness, may be good as a contingent remainder, on account of the necessity, which the

(*s*) *Ante*, p. 269, where the case of *Re Wass*, [1882] W. N. 158, is referred to. If that case was rightly decided, it seems to follow that a gift to such of the children of A as shall be living at the time of the testator's decease or born in due time thereafter and shall attain the age of twenty-five years, would be void for remoteness. The point, however, did not arise in *Re Wass*, and when the case occurs the Court may possibly give effect to the obvious intention of the testator.

(*t*) First edition, p. 226.

(*u*) 8 Sim. 616; and see *Boughton* v. *James*, 1 Coll. 26; 1 H. L. C. 406; *Griffith* v. *Blunt*, 4 Bea. 248; *Leake* v. *Robinson*, 2 Mer. 363, and other cases cited *post*, p. 305.

(*x*) First edition, p. 229. It will be remembered that legal remainders were abolished on January 1, 1926.

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rules applicable to contingent remainders impose, of its vesting, if at all, at the instant of the determination of the preceding estate for life. Such an estate, therefore, if limited to a person who was in existence at the death of the testator, necessarily restricts the devise within proper bounds. Thus, if lands of which the testator had the legal inheritance be devised to A for life, with remainder in fee to the children of A who shall attain the age of twenty-two, the devise in remainder will be good, because if at the death of A no child has attained the vesting age, the remainder will fail under the doctrine in question (*y*); and if any child has attained that age, the devise will take effect in favour of such child, to the exclusion of any child or children afterwards attaining the prescribed age" (*z*).

The doctrine does not apply to equitable contingent remainders (*a*).

Ascertainment of class.

Difficult questions frequently arise as to whether a limitation of this kind is a contingent remainder or an executory devise; the question is of importance in connection with gifts to classes, because it regulates the manner in which the class is ascertained (*b*).

Where interests are vested.

It has been already mentioned that a gift which is apparently contingent and void for remoteness, is valid because in fact it confers an interest which is vested subject to being divested (*c*). The distinction is sometimes fine. Thus, in *Re Mervin* (*d*), the testator gave his property upon trust for the children of his son J. as and when they should respectively attain the age of twenty-five years, and gave his trustees power in the meantime to apply the whole or any part of the income for the maintenance of such grandchildren during their minority, and to apply for the advancement of them or any of them one-half of the capital to which they or he might be entitled expectant on their, his, or her attaining the age of twenty-five years. It was held that the grandchildren did not take vested interests, and that the gift was void for remoteness. On the other hand, in *Re Turney* (*e*), a testator gave a fund upon trust

(*y*) See Fearne, Cont. Rem. 4; *Festing* v. *Allen*, 12 Mee. & W. 279; *Alexander* v. *Alexander*, 16 C. B. 59.

(*z*) This appears to be the passage referred to with approval by Hall, V.-C., in *Brackenbury* v. *Gibbons*, 2 Ch. D. 419; the reference to the page, however, would indicate the third edition (by Messrs. Wolstenholme and Vincent), in which the passage in question, although attributed to Mr. Jarman, is materially altered. The operation of the rule thus stated by Mr. Jarman is considered in connection with the Contingent Remainders Act, 1877, *post*, p. 1418.

(*a*) *Abbiss* v. *Burney*, 17 Ch. D. 211.

(*b*) See *Dean* v. *Dean*, [1891] 3 Ch. 150, *post*, p. 1421.

(*c*) *Ante*, p. 273.

(*d*) [1891] 3 Ch. 197.

(*e*) [1899] 2 Ch. 739.

Re Turney.

for his daughter for life, and after her death in trust for all her children when they should attain twenty-five, but not before, and gave a moiety of the residue of his estate upon trust for his son for life, and after his death for his child or children absolutely upon their attaining twenty-five; the will contained references to the "shares" and "portions" of the grandchildren, and provisions for their maintenance, and the Court of Appeal held, on the construction of the whole will, that the grandchildren took immediate vested interests, subject to being divested in case they did not attain twenty-five, and that the trusts were not void for remoteness (*f*).

Postponement of payment of vested shares beyond age of twenty-one.

Again, if there is a gift to the children of A, followed by a direction to postpone payment of the respective shares until the children attain twenty-five, this direction is disregarded, and the children of A living at the testator's death take vested interests (*g*).

Class capable of enlargement or diminution.

An apparent exception to the doctrine that vested interests are not open to the objection of remoteness, occurs in those cases where property is given to a class which is liable to fluctuation after the period allowed by the Rule. Thus, suppose property to be given to A, a bachelor, for life, with remainder to his eldest son for life, remainder to those children of B who attain twenty-five: at the testator's death B is living, and one of his children, C, has attained twenty-five. Here C's interest is vested, and yet the gift to B's children is too remote, for although the maximum size of each child's share will be fixed at B's death, the minimum may not be determined until twenty-five years afterwards (*h*).

Class ascertained at testator's death.

A gift to a class may be good, because although it is, in form, a gift to a class which may not be ascertained within due limits, it is, in fact (having regard to the state of things existing at the testator's death (*i*)), a gift to a class which must be ascertained within due limits. Thus, in *Picken* v. *Matthews* (*k*), a testator gave his real and personal property upon trust for such of the children of his daughters as should live to attain twenty-five. At his death one of his daughters had a child who had attained twenty-five: there were other children under that age. It was held that the class consisted of the daughter's children who were

(*f*) *Post*, p. 1404. The cases on vesting are considered in *Re Ussher*, [1922] 2 Ch. 321.

(*g*) See *Kevern* v. *Williams*, 5 Sim. 171; *Elliott* v. *Elliott*, 12 Sim. 276 (commented on *post*, Chap. XLII); *Re Coppard's Estate*, 35 Ch. D. 350; *Re Barker*, 92 L. T. 831, *infra*, note (*l*).

(*h*) Gray on Perp., §§ 110 a, 205 a.

(*i*) *Ante*, p. 271.

(*k*) 10 Ch. D. 264. If no child of either daughter had attained twenty-five at the testator's death, the gift would have failed: *Re Mervin*, [1891] 3 Ch. 197.

living at the death of the testator, subject to their attaining twenty-five. But if a proviso is added that in the event of any child dying under twenty-five, his or her children who attain twenty-five shall take their parents' share, the whole gift is bad for remoteness (*l*).

Von Brockdorff v. *Malcolm.*

Again, in *Von Brockdorff* v. *Malcolm* (*m*), property was settled upon A for life, and after his death upon such of his issue born in his lifetime as he should appoint: by will, he appointed it to all his daughters who should survive him, and should, during his lifetime, or after his death, attain twenty-four. A left four daughters, of whom the youngest was over three years old at his death. The appointment was held to be good. Pearson, J., seemed to think the case was governed by *Wilkinson* v. *Duncan* (*n*), but that was a case of independent gifts (*o*), and the real reason why the appointment in *Von Brockdorff* v. *Malcolm* was good is that given by Mr. Gray (*p*), namely, that the class of daughters surviving the testator was closed when the will took effect, and the appointment was to such of them as should attain twenty-four; the ultimate class, therefore, would necessarily be ascertained within twenty-one years after his death.

Gift of personal estate to a class which may comprise objects too remote, void as to all.

"It is to be observed," says Mr. Jarman (*q*), "that where a gift to a class extends to objects too remote, the fact that *some* of the objects eventually composing the class were actually born within the period allowed by the rule of law, will not render the gift valid, *quoad* those objects. Thus, in *Leake* v. *Robinson* (*r*), where certain stock and moneys were bequeathed to W. R. R. for life, and after his decease, to the child or children of the said W. R. R. who, being a son or sons, *should attain the age of twenty-five*, or being a daughter or daughters, attain that age, or be married with consent; and in case the said W. R. R. should happen to die without leaving issue living at the time of

(*l*) *Re Whitten*, 62 L. T. 391. In *Re Barker*, 92 L. T. 831, there were gifts of two moieties of the property, each followed by a substitutional gift to the issue of any child who predeceased its parent, although no life interest was given to that parent, part of the clause having been apparently struck out without altering the other part: it was held that as to one moiety the gift was good, as one of the children had attained twenty-five before the testator's death; in the case of the other moiety no child had attained that age, and the gift therefore failed.

(*m*) 30 Ch. D. 172; *Re Paul*, [1921] 2 Ch. 1.

(*n*) 7 Jur. (N.S.) 1182; *ante*, p. 291.

(*o*) *Post*, p. 307.

(*p*) Perp., Addendum (1st ed.); §§ 523 c, d (2nd ed.). The decision was followed in *Re Hallinan's Trusts*, [1904] 1 Ir. R. 452; *Re Thompson*, [1906] 2 Ch. 199; and *Re Paul*, [1921] 2 Ch. 1.

(*q*) First edition, p. 231.

(*r*) 2 Mer. 363, *post*, p. 329.

Leake v. *Robinson.*

his decease, or leaving such, they should all die before any of them should attain twenty-five, if sons, and if daughters, before they should attain such age, or be married as aforesaid, then to the brothers and sisters of the said W. R. R., on their attaining twenty-five, if a brother or brothers, and if a sister or sisters, on such age or marriage as aforesaid. It appeared that five of the brothers and sisters of W. R. R. were born before the testator's death, and it was contended, therefore, that the bequest, though confessedly void as to those born afterwards, was good as to these objects; for that no case had gone the length of deciding that persons who are capable of taking under a will should not take, merely because they are joined in a bequest with others who are incapable; but Sir W. Grant, M.R., held that the bequest was void as to the whole, observing, with his usual felicity: 'The bequests in question are not made to individuals, but to classes; and what I have to determine is, whether the class can take. I must make a new will for the testator, if I split into portions his general bequest to the class, and say that, because the rule of law forbids his intention from operating in favour of the whole class, I will make his bequests what he never intended them to be, *viz.*, a series of particular legacies to particular individuals; or, what he has as little in his contemplation, distinct bequests, in each instance, to different classes, namely, to grandchildren living at his death, and to grandchildren born after his death' (*s*).

"And even if all the members of the class had happened to be born during the life of the tenant for life, or even in the lifetime of the testator himself, the gift would nevertheless have been absolutely void, as it is an invariable principle in applying the rule under consideration, that regard is had to possible, not actual events, and the fact that the gift *might* have included objects too remote is fatal to its validity, irrespectively of the event."

In a simple case like *Leake* v. *Robinson*, it is easy to see how the gift to persons within the proper limits is so mixed up with the gift to those who are not, that the whole must fail, for it is clear that unless we wait beyond the allowed period, the precise

(*s*) The doctrine of *Leake* v. *Robinson* was discussed in *Hale* v. *Hale* (3 Ch. D. 643) and *Pearks* v. *Moseley* (5 App. Cas. 714). The books abound with cases in which the decision in *Leake* v. *Robinson* has been followed; it will be sufficient to refer to some of them: *Judd* v. *Judd*, 3 Sim. 525; *Newman* v. *Newman*, 10 *ib.* 51; *Comport* v. *Austen*, 12 *ib.* 218; *Ring* v. *Hardwick*, 2 Bea. 352; *Bull* v. *Pritchard*, 1 Russ. 213; 5 Hare, 567; *Vawdry* v. *Geddes*, 1 R. & My. 203; *Blagrove* v. *Hancock*, 16 Sim. 371; *Walker* v. *Mower*, 16 Bea. 365; *Southern* v. *Wollaston*, 16 Bea. 166; *Merlin* v. *Blagrave*, 25 Bea. 125; *Pickford* v. *Brown*, 2 K. & J. 426; *Read* v. *Gooding*, 21 Bea. 478; *Rowland* v. *Tawney*, 26 Bea. 67; *Smith* v. *Smith*, L. R. 5 Ch. 342, referred to below.

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shares of those within the proper limits could never be ascertained. Other cases have, however, occurred in which there has been much controversy as to what constitutes such a blending of the two gifts as will prevent the gift to the persons who are within the proper limits from taking effect.

Class of children and grandchildren.

The question has been much discussed in cases where there is a gift to a class composed of the children and grandchildren of a person. Thus, suppose property to be given to A for life, and after his death to all his children who attain twenty-one, and such of the children as attain twenty-one of any children of A who die under that age leaving issue, the grandchildren taking their parent's shares; here the number of shares is fixed at the death of A, but there is a possibility that A may leave a child under age, and if that child died under twenty-one, leaving children, some of them might not attain twenty-one within the limits fixed by the Rule against Perpetuities (*t*), so that the shares to be ultimately taken could not be ascertained within due time, and the whole gift is consequently void (*u*). It was at one time considered that in such a case the gifts might be severed, so that the gift to the children might be held good as an original gift, the gift to the grandchildren being treated as substitutional, apparently on the ground that effect ought to be given to the testator's intention as far as possible (*x*). But in applying the Rule against Perpetuities, the effect of the Rule is not allowed to influence the construction of the will, and it is now established that if the gift is to a class it cannot be severed (*y*).

Original and substitutional gifts—some may be valid.

If, however, the gift to the children is really original, and the gift to the grandchildren substitutional, the gift to the children is good (*z*). Thus, if a fund is bequeathed to the daughters of A (a person living at the testator's death), with a proviso that if any of them die under the age of twenty-one, leaving issue, the share of the daughter so dying shall go to such

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(*t*) If the gift were "to all the children of A who attain twenty-one and the issue of such of them as shall die under that age, leaving issue at their decease," it would, of course, be good: *per* Lord Selborne, in *Pearks* v. *Moseley*, 5 A. C. 719.

(*u*) Another example of the same principle will be found in *Blight* v. *Hartnoll*, 19 Ch. D. 294, *ante*, p. 282.

(*x*) *Per* Malins, V.-C., in *Re Moseley's Trusts*, L. R. 11 Eq. 499. See the decision of the same Judge in *Smith* v. *Smith*, shortly reported in L. R. 5 Ch. 342. It was overruled by the C. A.

(*y*) *Pearks* v. *Moseley*, 5 A. C. 714. The older cases are: *Seaman* v. *Wood*, 22 Bea. 591; *Webster* v. *Boddington*, 26 Bea. 128; *Stuart* v. *Cockerell*, L. R. 5 Ch. 713; *Hale* v. *Hale*, 3 Ch. D. 643; *Bentinck* v. *Portland*, 7 Ch. D. 693.

(*z*) Gray on Perp., § 386. *Packer* v. *Scott*, 33 Bea. 511, may have been decided on this ground, but the accuracy of the decision seems doubtful.

of her children as attain twenty-one; here the gift to the daughters of A is good, and if one of them is born after the testator's death and dies under twenty-one, leaving issue, the substitutional gift is clearly bad, and the original gift to the daughter is undisturbed. It seems also to follow that if a daughter of A, born in the testator's lifetime, dies under twenty-one, leaving children who attain twenty-one, the substitutional gift to those children will take effect. In *Goodier* v. *Johnson* (*a*) the testator directed his trustees, at a period which might possibly exceed the proper limits, to sell his real estate and divide the proceeds equally among the children of W. and M., "and the lawful issue of such of them as may be then dead, leaving issue," *per stirpes*. The trust for sale was bad (*b*), but the substantive gift of the property to the children of W. and M. was good, because, having regard to some peculiar clauses in the will, the Court held that the gift to the children was an original gift to them, with a substitutionary gift to their issue in certain events. "That will leave untouched the gift to the children who die without leaving issue, and if by rule of law the substitutionary gift in favour of the issue of any of the children cannot take effect, then the original gift to the children will take effect. The *corpus* is then effectually given, because it is given to a class to be ascertained within the limits of perpetuity, and to take a vested interest within those limits, subject to gifts over, which, if they are beyond the limits, fail, and leave the original gift unaffected" (*c*).

Goodier v. *Johnson.*

The question whether a gift is original or substitutional is discussed elsewhere (*d*).

Another difficult class of cases is where the question arises whether the testator has made an independent gift to each member of the class. Where he gives a fixed sum to each member of the class the gifts are separable, and will take effect or fail according to the event. Thus, in *Storrs* v. *Benbow* (*e*), where the testator bequeathed £500 to each child that might be born to either of the children of either of his brothers, it was decided by Lord Cranworth that the gift was valid as to the children of nephews who were born in the testator's lifetime, and void as to the children of the other nephews. He said it was a mistake to

Independent gifts.

(*a*) 18 Ch. D. 441.
(*b*) See *Goodier* v. *Edmunds*, [1893] 3 Ch. 455.
(*c*) *Per* Cotton, L.J., 18 Ch. D., p. 448. See also *Speakman* v. *Speakman*, 8 Ha. 180; *Taylor* v. *Frobisher*, 5 De G. & Sm. 191; *Gooch* v. *Gooch*, 3 D. M. & G. 366; *Baldwin* v. *Rogers*, 3 D. M. & G. 649.
(*d*) Chap. XXXVI, *post*, p. 1283.
(*e*) 3 D. M. & G. 390; *Boughton* v. *Boughton*, 1 H. L. C. 406; *Wilkinson* v. *Duncan*, 30 Bea. 111.

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compare the case with *Leake* v. *Robinson*. The legacy given to one of the former set of children could not be bad because there was a legacy given under a similar description to a person who would not be able to take because the gift was too remote.

Separable gifts.

And even where a fund is given among a number of unascertained persons, so that the share of each depends on the number of the class, yet if this number must be ascertained within the limits of the Rule against Perpetuities the gifts are separable. Thus, in *Griffith* v. *Pownall* (*f*), A had a power to appoint among all the children of B, begotten and to be begotten, and their issue; and in default to the children equally. All the children that B ever had (six in number) were born at the time of the creation of the power, and A appointed that the share which each child of B, begotten and to be begotten, was entitled to in default of appointment, should be held in trust for that child for life, and after its death for its children. Sir L. Shadwell, V.-C., held the appointment valid. He said that, if the gift be of the bulk of the property amongst a set of persons collectively, some of whom are within the rule of law as to perpetuity, but the rest of them are not, the gift is void *in toto*. That in the case before him the gift was not of the bulk of the fund, but the testator merely directed how the share of each daughter should go after her death. If there had been a seventh or eighth daughter, the gift would have been bad as to their children; nevertheless, the gift to the elder children would have been good.

Griffith v. *Pownall.*

Greenwood v. *Roberts, contra.*

The distinction was disregarded in *Greenwood* v. *Roberts* (*g*), where the testator bequeathed personal property upon trust, among other things, to pay his brother Thomas an annuity of £200 a year, and after his decease to pay the same to and amongst *such of his children as might be then living* in equal shares during their respective lives, and at the decease of any of them, he ordered that so much of the principal or capital stock as had been adequate to the payment of the annuity to which the child so dying had been entitled during his or her life, should be sold, and the produce thereof divided equally amongst the children of him or her so dying, when they should severally attain the age of twenty-one years; he gave them vested interests therein; and further directed that if any of the children of his brother Thomas should at his (Thomas's) death be dead and have left issue, such issue should be entitled among them to the

(*f*) 13 Sim. 393. The remarks on the cases of *Griffith* v. *Pownall*, *Greenwood* v. *Roberts*, *Cattlin* v. *Brown*, *Wilson* v. *Wilson*, and *Knapping* v. *Tomlinson*, are taken verbatim from the fourth edition of this work, by Mr. Vincent.

(*g*) 15 Bea. 92.

same sum as they would eventually have been entitled to had their parents survived Thomas. Thomas survived the testator, and left a son Richard, who was alive at the death of the testator; but it was held by Sir J. Romilly, M.R., that the children of Richard could not take. He said: "The gift is, in the first instance, distinctly to a class, namely, to such of the children of his brother Thomas as may be then living, and Richard takes a life interest in that bequest solely in his character of one of those children. The gift over after the decease of those children is not confined to such of the children of his brother as should be alive at the testator's decease, and nothing points to Richard more than any other child of Thomas, who might be born after the death of the testator. I am of opinion that I must, upon the expression used by the testator, treat 'the children of him or her so dying' as another class, and that I cannot, because the testator has directed that on the death of Thomas the fund is to be equally divided between such of his children as shall be then alive, treat the bequest as if it had been a separate set of bequests to each of such children as eventually constituted the class; and therefore, in my opinion, he has given this annuity to a class to be ascertained at a future period, and after the death of each of the persons constituting that class *to another class*, some of whom are prohibited by law from taking, by reason of the Rule against Perpetuities. If I am correct in this view, the rule in *Leake* v. *Robinson* must apply. I am of opinion that Richard is neither mentioned nor individually described in the will as a person taking (to use Lord Cottenham's expression, in *Roberts* v. *Roberts* (*h*)), a separate and individual portion of the annuity bequeathed to Thomas, but that he takes it as one of a class, and that his children intended by the testator to take after his decease, are persons forming part of a class, some of whom are precluded from taking, and consequently that the gift over after his decease is void."

Remarks on *Greenwood* v. *Roberts*.

But *Leake* v. *Robinson* appears not to justify the use here made of the word "class." The grandchildren were not all of one class; there were as many separate classes of grandchildren as there were children of Thomas, and although to save repetition the gifts to all these classes was included in one set of words, the gift to each of them was wholly independent of the gifts to the others, its amount having been finally ascertained at the death of Thomas, when the number of his children who survived him or predeceased him leaving issue was known. A number of persons are popularly said to form a class when they can be designated by some general name, as "children," "grand-

What constitutes a gift to a class.

(*h*) 2 Phill. 534.

children," "nephews"; but in legal language the question whether a gift is one to a class depends not upon these considerations, but upon the mode of the gift itself, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons. Thus, a bequest of £1,000 to the children of A, the eldest child to take one moiety, the younger children the other moiety, is, in ordinary language, a gift to one class of persons, namely, children; in the legal acceptation of the words it is a gift partly to an individual, namely, the eldest child of A, and partly to a class, namely, his younger children. On the other hand, a gift to A, B, and C, and the children of D, share and share alike, may, legally speaking, be a gift to a class (*i*), but yet these persons would not in the ordinary acceptation of the term form a class. Moreover, under a gift to a class, if any of the class take, they take the whole; the subject of gift can never, therefore, be partly disposed of and partly undisposed of; this shows that the grandchildren in *Greenwood* v. *Roberts* did not take as a class, for supposing the gift valid, the children of one child of Thomas would have taken part of the fund, while another part would have been undisposed of if another child of Thomas had no children (*k*).

Cattlin v. *Brown.*

Gift held void in part only.

The principle of *Griffith* v. *Pownall* prevailed in *Cattlin* v. *Brown* (*l*), where a testator entitled to the equity of redemption

(*i*) "*Porter* v. *Fox*, 6 Sim. 485. See also *Clark* v. *Phillips*, 17 Jur. 886; *Re Stanhope's Trusts*, 27 Bea. 201; *Knapping* v. *Tomlinson*, 34 L. J. Ch. 7; *Aspinall* v. *Duckworth*, 35 Bea. 307. *Re Ann Wood's Will*, 31 Bea. 323 (as to the lapsed share), and *Drakeford* v. *Drakeford*, 33 Bea. 46, are *contra*: *sed qu.*, and as to the last-named case, see 9 Jur. (N.S.) Pt. 2, 301. In *Re Chaplin's Trusts*, 33 L. J. Ch. 183, it was admitted by Wood, V.-C., that naming some of a class did not make it less a class; yet he held that the named person having died before the testator, his share lapsed; which seems contradictory." As mentioned above (p. 308), the remarks in the text and the foregoing note are an addition by Mr. Jarman's editors (see the fourth edition of this work, by Mr. Vincent, p. 268). In *Re Moss*, [1899] 2 Ch., at p. 317, they were attributed by Lindley, L.J., to Mr. Jarman. As to *Drakeford* v. *Drakeford*, see *post*, p. 411. The principle on which *Re Chaplin's Trusts* was decided is that a gift to a class is not the less a class gift because some members of that class are named: thus, a gift "to my son George and all sons of mine who may hereafter be born" is a good class gift. But a gift to a class and an individual who is not a member of that class, is not *prima facie* a class gift, though it may have the same effect as a gift to a class if the testator expresses an intention to that effect: *Kingsbury* v. *Walter*, [1901] A. C. 187. The question is discussed in Chap. XIII, in connection with the doctrine of lapse. The decision in *Re Chaplin's Trusts* was followed by Jessel, M.R., in *Re Allen* (or *Re Atter*), [1881] W. N. 6; 44 L. T. 240; 29 W. R. 480; and would apparently have been followed by Kay, J., in *Re Featherstone's Trusts*, 22 Ch. D. 111; and by Chitty, J., in *Re Jackson*, 25 Ch. D. 162, if the language of the wills had not been different. See also *Re Mervin*, [1891] 3 Ch. 197.

(*k*) *Greenwood* v. *Roberts* is also discussed in Gray, Perp. § 391.

(*l*) 11 Hare, 372. See also *Vanderplank* v. *King*, 3 Hare, 1.

in lands, subject to a mortgage in fee, devised them to T. B. C. for life, with remainder to all and every his child and children during their natural lives if more than one; and after the decease of any or either of such child or children then the part or share of him, her or them so dying was given to his, her or their child or children lawfully begotten or to be begotten, and to his, her or their heirs as tenants in common. T. B. C. left several children, some born in the testator's lifetime, some after his death; and it was held by Sir W. P. Wood, V.-C., that the shares of the children born in the lifetime of the testator were well given to their children though the gift to the other grandchildren failed. He thought *Greenwood* v. *Roberts* was distinguishable because "the children of the brother who were born and *in esse* at the death of the testator, might all have been dead at the death of the brother, and the case, therefore, fell within the rule in *Leake* v. *Robinson*. It was a gift to a class, and all the members of the class might be persons without the limits. The children born at the testator's death might take no interest whatever. On this ground the decision in *Greenwood* v. *Roberts* was no doubt perfectly right." And he intimated that the case before him might have been similar if the devise had been to the sons of T. B. C. living at his decease, with remainder to their sons in fee.

Explanation of *Greenwood* v. *Roberts* by Wood, V.-C.

Sir R. Kindersley said (*m*) he was unable to see the distinction here referred to: it appeared to him that in *Cattlin* v. *Brown* precisely the same observation would arise, and that it would be equally true that all the children of T. B. C. that were born and *in esse* at the death of the testator might die in the lifetime of T. B. C. He did not see how the observation or the ground of distinction applied; and it struck him that the same reason which was given in support of *Greenwood* v. *Roberts* would have required *Cattlin* v. *Brown* to be decided in the same way. It must also be observed that the M.R. himself declared (*n*) that the gift to grandchildren in the latter case would undoubtedly have been good if the class was to be ascertained at the death of Thomas; and he referred his decision to the clause which substituted the issue of any child of Thomas who should die before Thomas, in the place and to take the share of their parent, and to the fact that such issue took no vested interests until they attained twenty-one, so that if the children of Thomas who were living at the date of the will died before Thomas and left children who died under twenty-one leaving remoter issue, it would not be until these remoter issue attained twenty-one that

Remarks thereon by Kindersley, V.-C.

Explanation of *Greenwood* v. *Roberts* by Romilly, M.R.

(*m*) *Knapping* v. *Tomlinson*, 34 L. J. Ch. 3.
(*n*) See *Webster* v. *Boddington*, 26 Bea. 136.

CHAPTER X.

Remarks thereon.

the class would be ascertained, or the number of shares ascertained into which the fund would be divisible, and this would be too remote. This was a new ground. It was not taken in the case itself; doubtless because the substitution clause said nothing about the age of twenty-one. But if this clause is to be understood as so referring to the previous gift to grandchildren in remainder, as to import into itself the mention of that age, so also must it be deemed to import the declaration that the interests given were "vested." Besides, the intermediate interest was given for the benefit of the grandchildren during minority.

Wilson v. *Wilson.* Gift held void in part only.

The distinction already noticed as having been taken by Sir W. Wood regarding *Greenwood* v. *Roberts*, was disregarded by him in *Wilson* v. *Wilson* (*o*). The bequest there was of a sum of money upon trust to pay the income to the testator's wife during her life, and after her death in trust for the then present and future children of I. L. *who should be living at the death of the testator's wife*, and who should attain the age of twenty-one or marry, in equal shares; and the testator directed that the shares of each daughter should be settled upon trust for her for life, and after her death for her children. Sir W. Wood decided that the trust in favour of a child of a daughter who was living at the death of the testator was valid. He said, "I can conceive no ground why in respect of a child of I. L. *in esse* at the time of the testator's decease there should not be a direction that her share should be settled on her children. In *Porter* v. *Fox* (*p*) and that class of cases the difficulty arises from there being a gift to a class of persons some of whom can take whilst others cannot. In these cases it cannot be ascertained what is the share of each, and hence the gift is held void as to all. Here, however, the children of each child of I. L. form a separate class, and the share of each class is separately ascertainable."

Knapping v. *Tomlinson*, in part only.

Cattlin v. *Brown* was followed by Sir R. Kindersley in *Knapping* v. *Tomlinson* (*q*), where the devise was identical in its terms with that in the former case. The V.-C. reviewed all the cases, and expressed his entire concurrence with Sir W. Wood's decision, Sir J. Romilly having also declared (*r*) his approval of that decision, and having referred his own decision in *Greenwood* v. *Roberts* to grounds which at all events remove it from apparent opposition to the other authorities (*s*), it must be taken as settled that where the shares of all the

(*o*) 4 Jur. (N.S.) 1076; 28 L. J. Ch. 95.
(*p*) 6 Sim. 485.
(*q*) 34 L. J. Ch. 3; 10 Jur. (N.S.) 626.
(*r*) In *Webster* v. *Boddington*, 26 Bea. 137, 138.
(*s*) *Arnold* v. *Congreve*, 1 R. & My. 209 (where the point was not taken), is overruled. See *post*, p. 336 n. (*a*).

separate stocks can be ascertained within legal limits, as in those authorities, the rule in *Leake* v. *Robinson* is not applicable so as to defeat limitations, otherwise valid, of the separate shares.

Re Russell.

Accordingly, in *Re Russell* (*t*), where a testator gave his residuary estate in trust after the death of M. and her husband, for all the daughters of M. who should attain twenty-one or marry under that age, with a proviso that the share of any daughter should be held upon trust for her for life, and after her death upon similar trusts for her children as were thereinbefore provided for the children of M. : it was held that the proviso for settlement of the shares was applicable to each share separately, and that although it would have been void for remoteness in the case of daughters of M. born after the testator, it was valid in the case of daughters born in his lifetime.

Gift to a class including a named person.

"Where the testator has combined with the remote class a living person, in such a manner as to constitute him a member of the class, the gift to him cannot be distinguished from, and therefore shares the fate of, the gift to the other intended objects, with which it stands blended and associated" (*u*). This conclusion was questioned by a learned Judge (*x*), who thought the gift to the living person, when associated with a gift to a "class" (all to take as tenants in common), ought not to fail any more than it would if it had been associated with a gift to other named individuals to take with him as tenants in common. But the conclusion seems inevitable : for in the former case the share of the living person could not be ascertained but by reference to the number of members ultimately included in the class; and this could not be known within due limits. This it was that made the living person one of the class, subject to all the conditions that appertained to that character. *Leake* v. *Robinson* shows that it is not the description of the legatees as children or grandchildren that constitutes them a class, but the mode and conditions of the gift. Sir W. Grant there observed (*y*) that, supposing the distinction made (as was there attempted) between persons capable and persons incapable, there was still the difficulty of adjusting the proportions in which the capable children were to take, and in determining the manner and the period of ascertaining those proportions (*z*).

(*t*) [1895] 2 Ch. 698. See *Re Ferneley's Trusts*, [1902] 1 Ch. 543, *post*, p. 339.

(*u*) Thus Mr. Jarman, in the first edition of this work, p. 233, citing *Porter* v. *Fox*, 6 Sim. 485. See *Re Mervin*, [1891] 3 Ch. 197.

(*x*) Stuart, V.-C., in *James* v. *Lord Wynford*, 1 Sm. & Giff. 58, 59.

(*y*) 2 Mer. 390.

(*z*) The question might have been raised in *Webster* v. *Boddington*, 26 Bea. 128, but the point seems to have been taken for granted. As to gifts to classes, see further, Chap. XIII, *post*, pp. 406 *seq.*

CHAPTER X.

Whether the result would be the same if the gift were in joint tenancy, does not seem to have been decided. In the third edition of this work (by Messrs. Wolstenholme and Vincent) (*a*) the opinion was expressed that in such a case "the result would have been in accordance with the learned Judge's [Stuart, V.-C.] *dictum*: because the gift, so far as it was to others than the individual, being void, the whole fund would accrue to the individual."

As to provisions for grandchildren.

Mr. Jarman remarks (*b*) that "a testator is in less danger of transgressing the perpetuity rule, whilst providing for his own children and grandchildren, than when the objects of his bounty are the children and grandchildren of another; since, in the former case, he has only to avoid protracting the vesting of the grandchildren's shares beyond their ages of twenty-one years, and then the fact of the gift extending to after-born grandchildren would not invalidate it, because all the children of the testator must be *in esse* at his decease, and *their* children must be born in *their* lifetime, so that they necessarily come into existence during a life in being. On the other hand, a gift embracing the whole range of the unborn grandchildren of another living person would be clearly void, though the shares should be made to vest at majority or even at birth, for the grandfather might have children born after the testator's decease, and as the gift would extend to the children of such after-born children, it would be absolutely void for remoteness, and that, too, according to the principle already laid down, without regard to the fact of there being any such child or not."

Rules of construction not to be strained to render gift valid.

"It is clear," as Mr. Jarman also remarks (*c*), "that, in order to render a gift to a class of persons valid, the Court will not depart from the established rule of construction, which fixes its range of objects; for though it is probable that the testator, if interrogated on the point, would have consented to restrict the class for the purpose of bringing it within due limits, yet, as the will intimates no such intention, its judicial expositor is not warranted in so dealing with its contents.

Jee v. *Audley*.

"As in *Jee* v. *Audley* (*d*), where a testator bequeathed

(*a*) Page 252. Mr. Vincent seems subsequently to have entertained some doubt on the point, for in the fourth edition the passage above quoted is omitted, and there is substituted (in a footnote) the question: "If the gift were in joint tenancy, would the whole fund accrue to the individual?"

(*b*) First edition, p. 233.

(*c*) First edition, p. 253. See *Ward* v. *Van der Loeff*, [1924] A. C. 653.

(*d*) 1 Cox, 324. See also *Re Sayer's Trusts*, L. R. 6 Eq. 319; *Re Dawson*, 39 Ch. D. 155. Malins, V.-C., in *Cooper* v. *Laroche*, 17 Ch. D. 368, 373, held that he could have regard to the fact that a woman was past the age of child-bearing in determining whether or not a gift was void for remoteness.

Jee v. *Audley.*

£1,000 to be placed out at interest, which interest he gave to his wife during her life; and at her death he gave the £1,000 to his niece Mary Hall, *and the issue of her body* lawfully begotten and to be begotten; and *in default of such issue*, he gave it to be equally divided between the daughters *then living* of John Jee and Elizabeth Jee his wife. It was objected that the limitation to the daughters of John and Elizabeth Jee was void, as being too remote, being to take effect on a general failure of issue of Mary Hall, and was not confined to the daughters living at the death of the testator. On the other side, it was said that, though the late cases had decided that, on a gift to children generally, such children as should be living at the time of the distribution of the fund would be let in, yet it would be very hard to adhere to such a rule of construction so rigidly as to defeat the evident intention of the testator in this case, especially as there was no real possibility of J. and E. Jee having children after the testator's death, they being then seventy years old; and if there were two ways of construing words, that should be adopted which would give effect to the disposition made by the testator; that the cases which had decided that after-born children should take, proceeded on the implied intention of the testator, and never meant to give effect to words which would totally defeat such intention. But Sir Lloyd Kenyon, M.R., observed that it had been decided by several cases, that, in bequests to children, all those born before the interest vested in possession were entitled." It followed that the limitation in the will was void in its creation, and he declined to vary this construction, or to assume that John and Elizabeth would not have any more children, in order to give validity to the limitation.

Gift to unborn person answering a particular description.

(F) Gifts to Contingent Persons—Limitations to a Series.—As Mr. Jarman points out (*e*), "The doctrine that the validity of a gift is to be tried by possible, not actual, events is, of course, applicable no less to gifts to individuals than to gifts to classes. If, therefore, the devise or bequest be in favour of an unborn person, who may not answer the required description within a life and twenty-one years, it will be void, although a person should happen to answer the description within such period. Thus, if a testator give real or personal estate to an unborn

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But the V.-C.'s decision in that case, so far as regards this point, is contrary both to principle and to the current of authority, and not to be relied upon. See *Re Dawson*, 39 Ch. D., at p. 163. As to the cases in which the presumption that a woman is past child-bearing is made see *Re White*, [1901] 1 Ch. 570, where *Re Hocking*, [1898] 2 Ch. 567, is referred to.

(*e*) First edition, p. 233.

person, who shall thereafter happen to acquire some personal qualification, which is attainable at *any* period of life, and is not *necessarily* confined to minority, as in the case of a gift to the first son of A who shall obtain a commission in the Army, take a degree at the university, or marry, it is conceived that the gift would be void, even though A should happen to have a son who should answer the required qualification before the age of twenty-one."

Thus, in *Proctor* v. *Bishop of Bath and Wells* (*f*), there was a devise in fee to the first or other son of A that should be bred a clergyman and be in holy orders, but in case A should have no such son, then to B in fee. A died without ever having had a son, and it was held that the gift to B was void.

So in *Ibbetson* v. *Ibbetson* (*g*), the testator bequeathed chattels to the first tenant in tail of the age of twenty-one years who should be in possession of a certain mansion house : as there might be successive tenancies in tail without any tenant in tail attaining twenty-one, the bequest might remain suspended for an indefinite number of years, and was, therefore, void for remoteness.

Ker v. *Lord Dungannon* (*h*), *Lord Dungannon* v. *Smith* (*i*), *Wainman* v. *Field* (*k*), and *Re Atkinson* (*l*) were decided on the same principle.

Devise by reference to limitations of a deed.

In *Re Fane* (*m*), the testator devised his D. estates to trustees upon trust to pay the rents to his wife during her life, and at her death to raise two sums of £4,000 and, subject thereto, to assure the estate to such uses for such estates and with and subject to such powers and provisions as under and by virtue of two deeds and all mesne assurances acts and operations of law should at the time of the death of his wife be subsisting and capable of taking effect of and concerning the W. estate. At the death of the widow there was nothing in the then subsisting uses, powers and provisions of the W. estate which, if inserted in the testator's will, would have given rise to objection on the ground of remoteness. It was held that the trusts of the W. estate were vested. Buckley, L.J., said that *Lord Dungannon* v. *Smith* (*n*) was no

(*f*) 2 H. Bl. 358.

(*g*) 10 Sim. 495; 5 My. & C. 26; *Gormanston* v. *Gormanston*, [1923] 1 Ir. R. 137 (jewels to devolve as heirlooms with real estate). Other cases on settled chattels are referred to, *post*, p. 321, and *post*, pp. 669 *seq.*

(*h*) 1 Dr. & War. 509.

(*i*) 12 Cl. & F. 546. This case is stated below with reference to the question of separable limitations.

(*k*) Kay, 507. See also *Harding* v. *Nott*, 7 E. & B. 650; *Patching* v. *Barnett*, 51 L. J. Ch. 74 (gift to youngest grandson of A, living at decease of testator's wife, who should attain twenty-five).

(*l*) [1916] 1 Ch. 91.

(*m*) [1913] 1 Ch. 404.

(*n*) 12 Cl. & F. 546.

authority for the proposition that uncertainty at the testator's death whether the limitations introduced by reference would exceed the rule or not was a ground for saying that the rule against perpetuities had been infringed.

Limitation to a series.

Questions of this kind frequently arise where property is attempted to be limited to a series of persons answering a certain description. In such cases, as Mr. Jarman remarks (*o*), "there is no principle of law preventing a testator from so framing and moulding his disposition, as to make its validity depend on subsequent events; or, in other words, from availing himself of the course of circumstances posterior to the making of his will, in order to get as wide a range of postponement as possible; for instance, he may convert the intended estate tail of a person then unborn into an estate for life, in case of his happening to come *in esse* in his (the testator's) lifetime. In all cases of failure under circumstances of this nature, the deficiency is one not of power but of expression; and the question in every instance is, whether the testator had clearly shown an intention to take the most ample range or period of postponement, which subsequent circumstances admit of. A point of this kind was much canvassed under the will of Lord Vere (*p*), who bequeathed to trustees all his household goods, furniture, pictures, books, linen, &c., upon trust to permit his wife to have the use of them during her life, and, upon her death, to permit his son A B to have the use of the same goods, &c., for his life, and, upon the decease of the survivor of his (the testator's) wife and son, in trust for such person as should *from time to time* be Lord Vere, it being his will that the goods, &c., after the decease of his wife, should

Testator *may* mould his disposition according to subsequent events.

Tollemache v. *Earl of Coventry.*

(*o*) First edition, p. 234.

(*p*) "*Lord Deerhurst* v. *Duke of St. Albans*, 5 Mad. 232; *S. C.* in D. P. nom. *Tollemache* v. *Earl of Coventry*, 2 Cl. & Fin. 611; 8 Bli. (N.S.) 547. Compare this case with *Tregonwell* v. *Sydenham*, 3 Dow, 194, where a testator, after devising lands (subject to certain terms for years which he created for the purposes thereinafter mentioned) to A for life, remainder to his first and other sons in tail male, with remainder to the eldest daughter of A in tail general, with remainders over, directed that when a certain sum of money should be raised out of the rents of his lands under a term of sixty years,* the same should be settled to the use for life of the person who happened then to be entitled in possession under the limitations in his will, with remainder (in effect) to his issue in strict settlement.† When the time arrived for laying out the money, it happened that the person entitled in possession under the limitation in question was not *in esse* at the testator's death, and therefore could not be made tenant for life with remainder to his issue, so that the trust for laying out the money had failed in event; but the grounds on which Lord Eldon rested the decision of the House show, that if the person entitled in possession had happened to be a person *in esse* at the testator's death, the trust for laying out the money would in his Lordship's opinion have been legal." [Notes by Mr. Jarman.]

* "This was prior to the stat. 40 Geo. 3, c. 98, stated *post*, p. 353.

† "This was the effect, though not the precise language."

from time to time go and be held and enjoyed with the title of the family, as far as the rules of law and equity would permit. At the death of the testator, the title of Lord Vere descended upon his son, the legatee for life, upon whose decease it descended to his son (the testator's grandson, who was also living at the death of the testator), and upon the death of the grandson, it descended to the testator's great grandson, who was born after the death of the testator. The chief struggle was between the personal representatives of the grandson and those of the great grandson. As the former was born in the testator's lifetime, it was clear that he *might* have been made legatee for life, with remainder absolutely to the person next in succession, and the question, therefore, was, whether the will authorised such a construction. Sir J. Leach, V.-C., before whom the case was originally brought, decided in the affirmative." His Honour said that by the rules of law and equity every person living at the death of the testator, who should become Lord Vere, might be limited to the use and enjoyment only. The son and grandson of the testator were living at his death, and both, therefore, were limited to the use and enjoyment only, but the child who succeeded the grandson as Lord Vere and Duke of St. Albans was not living at the death of the testator, and could not, therefore, by the rules of law and equity, be limited to the use and enjoyment only; he took, therefore, an absolute interest, which was vested in his personal representative.

Devise to a person who *might* not answer a certain qualification within allowed period, held void, irrespectively of event.

This judgment was affirmed by Lord Lyndhurst, but was reversed in D. P. on the advice of Lord Brougham, C. He admitted that the testator might lawfully have limited the chattels to go according to the decree of the V.-C. if he had used the proper words; but first he said there was no authority for putting that construction on the words used; and secondly he took a new objection, founded on the bequest being an attempted annexation of chattels to an honour; which he described as an attempt to create a new species of limitation in succession, unknown to the law, to spring up with the person, that is, to the Lords Vere whoever they might be; and he mentioned certain contingencies, especially a possible abeyance of the honour, which, in his opinion, showed that there might be no one to answer that description within the allowed period; and although none of those contingencies had happened, the soundness of the limitations could not depend on the event.

Lord St. Leonards has criticised this judgment (*q*), and has

(*q*) Law of Prop. 336; Gray on Perp., § 401 *seq.* See the observations of Hall, V.-C., in *Re Roberts*, 19 Ch. D. 525. See also *Re Viscount Exmouth*, 23 Ch. D. 158.

adduced authorities to show that chattels may be limited to go along with an honour; and with regard to the question of construction (which is of the greatest interest here), he distinguishes between a compendious limitation to several persons successively, where the legal limit can clearly be marked, as in Lord Vere's will, and a limitation like that in *Lord Dungannon* v. *Smith*, where only one person was to take, and it depended on the event whether the person who lived to answer the description would or would not come *in esse* within the legal period. He thought *Tregonwell* v. *Sydenham* a grave authority for giving effect to such a limitation as that in Lord Vere's will as far as the events would allow, keeping within the legal boundary.

Point decided in *Tollemache* v. *Coventry*.

There has been much discussion as to the ultimate decision in *Tollemache* v. *Coventry*. According to some of the common law Judges in *Lord Dungannon* v. *Smith* (*r*), although all that was decided in *Tollemache* v. *Coventry* was that the great grandson did not take, yet the reasoning on which this decision proceeded was equally unfavourable to the claim of the grandson, and undoubtedly this would have been the logical result of Lord Brougham's reasoning. But he did not go so far, and it seems clear from the concluding words of his judgment, and from the headnote, that the decision was in favour of the grandson. This is now generally accepted as the result of the case (*s*).

Result of the authorities.

The principle to be deduced from these authorities is, that where there is a gift to a series of persons answering a certain description, it is good so far as concerns the first member of that series, if he must take on the death of a living person, although the gift may be bad as regards the second and all the later members of the series, because otherwise they might possibly take beyond the limits fixed by the Rule against Perpetuities (*t*).

Vested or contingent remainder.

In *Re Barbre's Settlement* (*u*), land was limited, after a limitation in remainder to the use of the eldest son of the settlor's daughter C for life, to the use of the next eldest son of C who should be living at the decease of her eldest son and so from and after the decease of any son of C to whom the premises should come to such son of C as should be next in seniority and should be living at the decease of the son so dying for life. The question was raised whether the limitations after the life

(*r*) 12 Cl. & F. 546.

(*s*) *Re Viscount Exmouth*, 23 Ch. D. 158; *Re Johnston*, 26 Ch. D. 538; *Re Hill*, [1902] 1 Ch. 807.

(*t*) Gray, Perp., § 406 *seq.* As to the nature of the interest taken by the first member of the series, see *post*, p. 1164.

(*u*) 115 L. T. 294.

estate to C's eldest son were vested or contingent. It was held that the remainder was vested and not void for perpetuity.

Children *en ventre.*

It will, of course, be remembered that according to the doctrine settled by recent decisions (*x*), a child *en ventre sa mère* is considered a living person, and consequently if there is a devise upon trust for each son of A successively for life, with remainder to his sons in tail, and a son of A is *en ventre sa mère* at the testator's death, then if this son becomes tenant for life by the failure of the prior limitations, the limitations after his life estate are valid, although it may be to his interest to contend that they are void under the Rule against Perpetuities (*y*).

Shifting clause or gift over on breach of condition.

It is hardly necessary to say that a shifting clause, or a gift over on breach of a condition (*e.g.*, a name and arms clause) is void unless it must necessarily take effect within the period allowed by the Rule against Perpetuities (*z*), or unless it is annexed to an estate tail (*a*).

In *Bacon* v. *Proctor* (*b*), land was devised in trust to pay the rents to such person of the testator's own name as for the time being should succeed to his title of a baronet, to the end that his said estate might be continued in his name, blood, and family, and be enjoyed and go along with his title, so long as the rules of law and equity should permit : it was held that the testator's eldest son took a life interest in the estate.

The case of *Mackworth* v. *Hinxman* (*c*) has been already referred to. The decision is questioned by Lord St. Leonards (*d*) and by Mr. Gray (*e*).

Gift to survivor of class.

It is clear that a gift to the survivor of a class of persons is bad if he will not necessarily be ascertained within the period allowed by the Rule, although a gift to the whole class might be good. Thus, if property is given upon trust for A for life, and after his death upon trust for his children during their lives, and after the death of all the children, except one, upon trust for that one absolutely, this ultimate gift is bad for remote-

(*x*) See *post*, pp. 1677 *seq.*

(*y*) *Re Wilmer's Trusts*, [1903] 2 Ch. 411.

(*z*) *Bennett* v. *Bennett*, 2 Dr. & Sm., at p. 276; *Re Staveley*, 124 L. T. 466; *Portman* v. *Portman*, [1922] 2 A. C. 473 (chattels settled to go with mansion house). The introduction of these executory limitations, of a kind unknown to the common law, was the reason which led to the establishment of the Rule against Perpetuities in its present form : *ante*, p. 266.

(*a*) *Ante*, p. 294. See further as to shifting clauses, *post*, pp. 1411 *seq.*

(*b*) T. & R. 31.

(*c*) 2 Keen, 658.

(*d*) Law of Property, 341.

(*e*) Perp., § 399, n.

ness (*f*). Cases of this kind must be distinguished from those in which successive life interests are given to a class of unborn persons. These are discussed in the next section.

A gift of property to persons answering a certain description at the testator's death is free from objection on the score of remoteness, and sometimes a gift which suggests an intention on the part of the testator to give property to persons in succession has been held to be a gift to individuals living at his death (*g*).

Re Roberts.

In *Re Roberts* (*h*), the testatrix bequeathed a fund upon trust for her brother J. R. G. for life, and after his death for his son, A. R. G., for life, and after the decease of both of them, upon trust to pay the income "for life unto any immediate or direct descendants of my said brother and nephew who shall bear the name of R. G. only, and from and after his or her decease, or in case of failure of any such immediate or direct descendant of my said brother or nephew who shall bear the name of R. G. only," then upon trust for certain charities. Hall, V.-C., thought that the trust was intended to include a series of persons answering the description of descendants, and was, therefore, void for remoteness. The Court of Appeal, however, held that the gift after the death of the brother and nephew was to a class consisting of their descendants then living and bearing the name of R. G. for their lives, and was, consequently, a valid gift.

The cases of *Brett* v. *Sawbridge* (*i*), and *Pelham* v. *Gregory* (*k*), are referred to in Chapter XXXIII.

Vesting of personal property given in strict settlement must not be deferred till any tenant in tail attains twenty-one.

Where freehold lands are limited in strict settlement, and leasehold or other personal property is vested in trustees, upon corresponding trusts (*l*), but so as not to vest absolutely in any tenant in tail till he shall attain the age of twenty-one years, but on his death under age to devolve as the freeholds, this trust, so far as it is limited in favour of tenants in tail, is void, since by the death of successive tenants in tail under age and leaving issue, the vesting of the leaseholds might be deferred beyond the period allowed by law. Care should therefore be taken that the vesting is only deferred till some tenant in tail by purchase

(*f*) *Garland* v. *Brown*, 10 L. T. 292; *Courtier* v. *Oram*, 21 Bea. 91. See the remarks on *Re Ashforth*, [1905] 1 Ch. 535, *post*, p. 347.

(*g*) *Comm. of Donations* v. *De Clifford*, 1 Dr. & War. 245; *Liley* v. *Hey*, 1 Ha. 580; *ante*, p. 208.

(*h*) 19 Ch. D. 520.

(*i*) 3 Bro. P. C. 141, *post*, p. 1164.

(*k*) 3 Bro. P. C. 204, *post*, p. 1164.

(*l*) It will be remembered that since 1925 personalty may be entailed, and consequently may be settled on the same limitations or trusts as land.

attains the age of twenty-one years (*m*). The authorities on this subject as discussed in Chapter XXXIII (*n*).

Gift to unborn person for life valid.

(G) GIFTS TO UNBORN PERSONS FOR LIFE, AND SUBSEQUENT LIMITATIONS (*o*).—As Mr. Jarman points out (*p*), "If the objects of a future gift are within the line prescribed by the Rule against Perpetuities, of course it is immaterial what is the nature of the interest which such gift confers (*q*). It would be very absurd that persons should be competent to take an estate in fee in land, or an absolute interest in personalty, and nevertheless be incapable of taking a temporary or terminable interest (for the larger includes the less), and yet it would not be difficult to cite *dicta* (*r*), nay, even to adduce a decision (*s*), propounding the doctrine that a life interest cannot be given to an unborn person." The fallacy probably arose, as Mr. Jarman suggests,

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(*m*) This was the common form, 3 Davidson's Prec. 602, 627. If the clause stops short with the proviso against absolute vesting, and omits the concluding gift over, remoteness is avoided without help of the words "by purchase." For then there is no gift of the personalty except in the primary trust, and under this trust it vests absolutely in the first tenant in tail by purchase: and the proviso, being but an accessory to that, must be construed also to relate only to tenants in tail by purchase: *Christie* v. *Gosling*, L. R. 1 H. L. 279; *Martelli* v. *Holloway*, L. R. 5 H. L. 532. (It should be mentioned that this somewhat forced construction was not approved by Lord St. Leonards, L. R. 1 H. L., at p. 293, or, apparently, by Lord Cairns, L. R. 5 H. L. at p, 103). According to this construction, however, the intention to keep the two species of property together as long as possible fails. The concluding gift over is required to effectuate this intention, and as this gift contains trusts for tenants in tail taking by descent, the rule of construction established in *Christie* v. *Gosling* is inapplicable, and the words "by purchase" are needed to obviate remoteness; see *Gosling* v. *Gosling*, 1 De G. J. & S. 16. In *Harrington* v. *Harrington*, L. R. 5 H. L. 87, where chattels were directed to go with settled land "so far as the rules of law or equity would permit," the person next in succession became entitled to the chattels, whether the trust was effectual or whether it was void for remoteness, and the question as to the effect of those words was not decided. See also *Gormanston* v. *Gormanston*, [1923] 1 Ir. R. 137; *Portman* v. *Portman*, [1922] 2 A. C. 473.

(*n*) Section 42 of the Conveyancing Act, 1881 (replaced by section 3 of the Trustee Act, 1925), which empowers trustees of land to which an infant is entitled in possession to accumulate the surplus rents, applies to tenants in tail by descent.

(*o*) As to children *en ventre*, see *ante*, p. 269.

(*p*) First edition, p. 239.

(*q*) *Cotton* v. *Heath*, 1 Roll. Ab. 612, pl. 3; *Marlborough* v. *Godolphin*, 1 Ed. 415; *Doe* d. *Tooley* v. *Gunniss*, 4 Taunt. 313; *Doe* d. *Liversage* v. *Vaughan*, 1 D. & Ry. 52; 5 B. & Ald. 464; *Ashley* v. *Ashley*, 6 Sim. 358 (cross remainders between unborn persons for life); *Denn* v. *Page*, 3 T. R. 87, n.; 11 East, 603; *Hay* v. *Earl of Coventry*, 3 T. R. 83; *Foster* v. *Romney*, 11 East, 594; *Bennett* v. *Lowe*, 5 M. & Pay. 485; 7 Bing. 535; *Routledge* v. *Dorril*, 2 Ves. jun. 366; *Burley* v. *Evelyn*, 16 Sim. 290; *Hampton* v. *Holman*, 5 Ch. D. 183; and see Fearne, C. R. 503. See, however, the criticism of Malins, V.-C., in *Stuart* v. *Cockerell*, L. R. 7 Eq., at p. 370, on the decision of Shadwell, V.-C., in *Ashley* v. *Ashley*, *sup.* as to cross remainders for life to unborn persons.

(*r*) *Deerhurst* v. *St. Albans*, 5 Madd., at p. 278.

(*s*) *Hayes* v. *Hayes*, 4 Russ. 311; see as to this case, 6 Hare, 250; 1 Coll. 37; 5 Ch. D. 188.

from the terms in which the rule in *Whitby* v. *Mitchell* (*t*) has been often laid down, namely, that you cannot give an estate for life in land to an unborn person, with remainder to his issue, which has been read as two distinct propositions, the one affirming the invalidity of a limitation for life to an unborn person, and the other the invalidity of a limitation to the issue; though, in fact, all that is meant to be averred is, that a limitation of land by way of remainder to the children or issue of an unborn person, following a gift for life to such unborn person, is bad, which it clearly is, under the rule which has been already considered (*u*).

As to gifts in remainder expectant on estate for life to unborn person, generally.

"As a gift for life to an unborn person is valid, so it is clear is a remainder expectant on such gift, provided it be made to take effect in favour of persons who are competent objects of gift (*x*); though here also a fallacy prevails; for it is not uncommon to find it stated in unqualified terms, that, though you may give a life interest to an unborn person, every ulterior gift is necessarily and absolutely void; and some countenance to this doctrine is to be found in the judgment, as reported, of an able Judge (*y*), though the adjudication itself, rightly considered, lends no support to any such doctrine, as the ulterior gift, which was there pronounced to be void, was nothing more than a declaration that the property should go according to the Statute of Distribution; so that the claim of the next of kin, who was held to be entitled, was perfectly consistent with the will, unless, indeed, it applied to the next of kin at the death of the unborn legatee for life, which would have been clearly void, as embracing persons who would not have been ascertainable until more than twenty-one years after a life in being; but for this construction there seems to have been no ground" (*z*).

And as a gift to an unborn person for life is good, so the gift of a life interest to an unborn person, determinable on a certain event happening during his lifetime, is good, although the event may not happen within the period of a life in being and twenty-one years afterwards (*a*).

Successive or cross life interests to unborn persons.

It is clear that successive life interests may be given to a number of unborn persons, provided they vest within the period allowed by the Rule: as in the case of a gift to A for life and

(*t*) See above, p. 257.
(*u*) See above, p. 257.
(*x*) *Routledge* v. *Dorril*, 2 Ves. jun. 366; *Evans* v. *Walker*, 3 Ch. D. 211; *Wainwright* v. *Miller*, [1897] 2 Ch. 255; *Re Roberts*, 19 Ch. D. 520.
(*y*) See *Cooke* v. *Bowler*, 2 Kee. 54.
(*z*) Mr. Jarman, in the first edition of this work, p. 241.
(*a*) *Wainwright* v. *Miller*, [1897] 2 Ch. 255, following the *dicta* of Knight Bruce, V.-C., in *Boughton* v. *James*, 1 Coll. C. C. 26, and distinguishing *Hodgson* v. *Halford*, 11 Ch. D. 959. See also *Re Cassel*, [1926] 1 Ch. 358, *ante*, p. 279.

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then to his children successively for their lives; here all the children living at A's death take vested interests, although the time of their enjoyment is uncertain (*b*). For the same reason, cross-remainders for life can be given to unborn persons (*c*).

A trust for the testator's brothers for their lives, and then for the benefit of their children, from year to year, "as the law admits," was held to cease twenty-one years after the decease of the surviving brother (*d*).

But if the ultimate gift is to a person, or class of persons, who cannot be ascertained within the period allowed by the Rule, it is void for remoteness (*e*).

It was at one time supposed that a gift of this kind would be good, if the intervening interests could be destroyed by alienation or release. Thus, in *Avern* v. *Lloyd* (*f*), where personalty was bequeathed to the issue of A, a living person, share and share alike for their lives, and for the survivors and survivor, and after the decease of the survivor, to the executors, administrators, and assigns of the survivor, Stuart, V.-C., held the ultimate limitation valid, on the ground that "each of the tenants for life had as much right to alien his contingent right to the absolute interest as to alien his life estate." But the notion that the power of alienation is of itself sufficient to exclude the Rule is now exploded (*g*), and *Avern* v. *Lloyd* is overruled (*h*).

Limitations dependent on a remote gift, void.

(H) Effect of the Rule on Ulterior Limitations.—Where a gift is void for remoteness, all limitations ulterior to and dependent on such remote gift are also void, though the object of the prior gift should never come into existence. Thus, in the often-cited case of *Proctor* v. *Bishop of Bath and Wells* (*i*),

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(*b*) *Gooch* v. *Gooch*, 3 D. M. & G. 366; *Garland* v. *Brown*, 10 L. T. 292; *Re Hargreaves*, 43 Ch. D. 401; *Re Ashforth*, [1905] 1 Ch. 535. The decision in *Whitby* v. *Von Luedecke*, [1906] 1 Ch. 783, seems erroneous, being inconsistent with the doctrine laid down by Lord Cranworth, C., in *Gooch* v. *Gooch* (3 D. M. & G., p. 383), that a gift to unborn children for life, with benefit of survivorship among them, is "a perfectly good trust." The question whether the gift to the survivor was good, being a contingent remainder, was not argued. *Whitby* v. *Von Luedecke* has, however, been followed in *Re Crichton's Settlement*, 106 L. T. 588; *Re Ramadge's Settlement*, [1919] 1 Ir. R. 205; and *Re Samuda's Settlement Trust*, [1924] 1 Ch. 61, so that it must be taken to be correct unless and until it is overruled by the Court of Appeal.

(*c*) *Ashley* v. *Ashley*, 6 Sim. 358; *ante*, note (*q*); as to this case, see Gray, § 207.

(*d*) *Pownall* v. *Graham*, 33 Bea. 242.

(*e*) *Re Gage*, [1898] 1 Ch. 498.

(*f*) L. R. 5 Eq. 383.

(*g*) *Ante*, p. 276. See *Curtis* v. *Lukin*, 5 Bea. 147.

(*h*) *Re Hargreaves*, 43 Ch. D. 401. See *Re Brown and Sibly*, 3 Ch. D. 156.

(*i*) 2 H. Bl. 358; also referred to *post*, p. 331. The principle of course applies to appointments under powers: *Routledge* v. *Dorril*, 2 Ves. jun. 357; *ante*, p. 291.

there was a devise to the first or other son of T. P. that should be bred a clergyman and be in holy orders, and to his heirs and assigns, but if the said T. P. should have no such son, then to T. M. his heirs and assigns. T. P. died without ever having had any son. As by the canons of the Church no person can be admitted into deacon's orders before the age of twenty-three, or be ordained priest before twenty-four, it was clear that this qualification postponed the devisee's interest until he attained the age of twenty-three at the least. The Court of C. P., therefore, held that the first devise was void for remoteness, and that the devise over, as it depended on the same contingency, was also void; observing, that there was no instance of a limitation after a prior devise, which was void for the contingency's being too remote, being let in to take effect (*k*).

Other instances.

On the same principle, if there is a gift of personal property upon trust for all the children of A, a living person, who are living at the expiration of twenty-eight years from the testator's death, and in default of such children to X, the gift over is void (*l*). So if there is a gift of personal property to A for life, and after his death to his children who attain twenty-five, and in default of such children to B, the gift over is void (*m*). In *Re Abbott* (*n*), Stirling, J., said: "It is settled that any limitation depending or expectant upon a prior limitation which is void for remoteness is invalid. The reason appears to be that the persons entitled under the subsequent limitation are not intended to take unless and until the prior limitation is exhausted: and as the prior limitation which is void for remoteness can never come into operation, much less be exhausted, it is impossible to give effect to the intentions of the settlor in favour of the beneficiaries under the subsequent limitation." It is submitted, however, that the true reason is that in applying the Rule against Perpetuities the Courts do not regard the intention of the testator, and that they regard possible, and not actual, events; under such a gift as that in *Palmer* v. *Holford*, A might have a child under seven years of age at the testator's death, and in that case B's interest would not vest within the period allowed by the Rule; the gift over is, therefore, bad *ab initio* (*o*). If the intention of the

(*k*) In *Robinson* v. *Hardcastle*, 2 Br. C. C. 22; 2 T. L. R. 241, 380, 781, it is not clear on what ground the decision proceeded.

(*l*) *Palmer* v. *Holford*, 4 Russ. 403, *ante*, p. 269. It does not appear whether the persons to take under the gift over were living at the testator's death: see Gray, § 252, n. See *Burley* v. *Evelyn*, 16 Sim. 290, *post*, p. 326, n. (*u*).

(*m*) *Per* Jessel, M.R., in *Miles* v. *Harford*, 12 Ch. D., at p. 703, quoted *post*, p. 331.

(*n*) [1893] 1 Ch., at p. 57.

(*o*) See *per* Leach, M.R., in *Palmer* v. *Holford*, *supra*.

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testator were regarded, then in the event of A never having a child, the gift over would be given effect to. But this is not the rule (*p*).

Independent limitations.

But a limitation following one which is too remote may be good, if it can take effect independently of the void limitation. For example, a gift over in default of appointment may be good, although the preceding power of appointment is bad for remoteness (*q*). So, where a testator devised property to trustees upon trust to sell it after the expiration of forty-nine years from his death, and to divide the proceeds of sale among persons ascertainable within the limits of the Rule, it was held that although the trust for sale was void, the legatees were entitled to the property (*r*). More difficult questions arise when the gift over is to take effect on an alternative contingency: these are considered in the next section.

Where life interest follows interests void for remoteness.

Mr. Gray remarks (*s*): "As all life interests to persons now in being must take effect, if at all, within lives in being, all such interests would seem to be good, although preceded by interests that are too remote." Mr. Gray's reasoning is unanswerable, so far as the general principle is concerned, but whether it would succeed if the question came before our Courts seems doubtful. No such exception to the general rule above stated (*t*) seems to be recognised, and in *Re Thatcher's Trusts* (*u*), where trusts which were void for remoteness were followed by a trust for A, a living person, for her life, it was held by Romilly, M.R., that the trust for A was void, although the previous trusts failed during her lifetime. He relied on the decision in *Beard* v. *Westcott* (*x*), as explained by Lord St. Leonards in *Monypenny* v. *Dering* (*y*). As the decision in *Beard* v. *Westcott* relates to an entirely different rule, it may be well shortly to explain the true principle on which it rests.

Vested remainder following contingent remainders which fail.

It will be remembered that legal contingent remainders are subject to two special rules, one requiring that every remainder shall vest on or before the determination of the preceding estate

(*p*) See *Miles* v. *Harford*, and other cases cited *post*.

(*q*) *Webb* v. *Sadler*, L. R. 8 Ch. 419; *Williamson* v. *Farwell*, 35 Ch. D. 128; *Re Abbott*, [1893] 1 Ch. 54.

(*r*) *Re Daveron*, [1893] 3 Ch. 421.

(*s*) Perp. § 252.

(*t*) By Jessel, M.R., and Stirling, J., *ante*, p. 321.

(*u*) 26 Bea. 365. Mr. Gray treats *Burley* v. *Evelyn*, 16 Sim. 290, as being to the same effect, but in that case A died before the first tenant for life.

(*x*) 5 B. & Ald. 801.

(*y*) 2 D. M. & G. 145.

of freehold, and the other forbidding the limitation of remainders to two or more unborn generations in succession (*z*).

As regards the former rule, it is clear that if land is devised to A for life, with remainder to unborn persons for particular estates (such as estates for life or in tail), with remainder to B, a person *in esse*, B takes a vested remainder, and if the intermediate contingent remainders fail, B's remainder takes effect (*a*).

And the same rule, it seems, generally applies where the particular estates are void *ab initio*. Thus, in *Avelyn* v. *Ward* (*b*), Lord Hardwicke remarked: "I know no case of a remainder or conditional limitation over of a real estate, whether by way of particular estate so as to leave a proper remainder, or to defeat an absolute fee before by a conditional limitation, but if the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes place."

Effect of old Rule against Perpetuities.

If, however, there is a vested remainder following a series of limitations which are void because they tend to create a "perpetuity" (or unbarrable entail) within the meaning of the old Rule against Perpetuities (*c*), then the vested remainder shares the fate of the contingent remainders which precede it. Thus, in *Re Mortimer* (*d*), land was devised to the use of A for life, with remainder to the use of his first and other sons successively for life, with remainder to the use of the first and other sons of each such son of A successively in tail male, with remainder to the daughters of each such son of A in tail, with remainder to the use of A's daughters in tail, with remainder to the use of A in fee simple. A survived the testator, and died a bachelor. It was held by Farwell, J., and the Court of Appeal, that the doctrine of *cy-près* was inapplicable, and that being so, it was conceded by the persons claiming under A that the ultimate limitation to him failed, and that there was an intestacy (*e*).

Attempt to create perpetuity by terms of years, etc.

The same principle applies where the testator attempts to create a "perpetuity," in the nature of an unbarrable entail, by limiting successive terms of years. Thus, in *Somerville* v.

(*z*) Williams, Real P. (12th ed., pp. 269, 274); approved in *Whitby* v. *Mitchell*, 44 Ch. D. 85.

(*a*) Fearne, C. R., 222; *Lewis* v. *Waters*, 6 East, 336.

(*b*) 1 Ves. sen. 420. See also the examples of vested remainders taking effect after devises to monks, given *arguendo* in *Robinson* v. *Hardcastle*, 2 T. R. 241.

(*c*) *Ante*, p. 255. This, of course, assumes that the limitations are not saved from failure by the doctrine of *cy-près*: *ante*, p. 258.

(*d*) [1905] 2 Ch. 502.

(*e*) The headnote states that the limitations after A's life estate were void "for remoteness," but this is inaccurate: they were void under the old Rule against Perpetuities; but for this Rule, the ultimate limitation to A in fee, being a vested remainder, would have been good.

Lethbridge (*f*), the testator devised lands upon trusts for A for ninety-nine years if he should so long live, with successive limitations of like terms for the lives of A's sons and their respective male issue, and in default of such issue to B, a living person, with similar limitations to his issue; at the death of the testator A was unmarried, and the limitations following the term for the life of his first unborn son were, therefore, void under the old Rule against Perpetuities (*g*), and consequently the limitation to B was also void. *Beard* v. *Westcott* (*h*) was a similar case. And *Burley* v. *Evelyn* (*i*) seems to have been decided on the same principle, though whether it was right to apply the technical doctrine of the old Rule against Perpetuities to a settlement of money may perhaps be doubted.

Sir E. Sugden (Lord St. Leonards) explained the decision in *Beard* v. *Westcott* as having been made in accordance with the ground urged by him in argument, namely, that the testator intended B to take only in case the previous limitations were capable of taking effect (*k*). But, as Mr Gray justly points out (*l*), "the imputation of such an intent to a testator seems unwarranted." The real reason, it is submitted, why the limitations to B and his issue were not allowed to take effect, is that they were part of a scheme for tying up the land by means of limitations in the nature of an unbarrable entail, and that the whole scheme was void (*m*).

It is, therefore, submitted that the *ratio decidendi* in *Beard* v. *Westcott* does not apply to such cases as *Re Thatcher's Trusts* (*n*), and that the decision in that case was erroneous; but *Re Thatcher's Trusts* has been followed in *Re Hewitt's Settlement* (*o*), and in *Re Ramadge's Settlement* (*p*), so that

(*f*) 6 T. R. 213. That the limitations were as stated in the text appears from *Beard* v. *Westcott*, 5 B. & Ald. 801, and Sugden's note to Gilbert on Uses, 269.

(*g*) *Ante*, p. 255.

(*h*) 5 Taunt. 393; 5 B. & Ald. 801. The doctrine of *cy-près* was inapplicable in these cases, because an entail could not be limited by terms of years: *ante*, p. 255.

(*i*) 16 Sim. 290, *ante*, p. 326, n. (*u*).

(*k*) *Monypenny* v. *Dering*, 2 D. M. & G. 182.

(*l*) Perp., § 254.

(*m*) It must be conceded that Lord St. Leonards never really grasped the distinction, clearly taken in Mr. Fearne's treatise, between "perpetuity" and "remoteness"; that this is so appears from the note in his edition of Gilbert on Uses, p. 260, where he treats the Chief Baron's definition of a perpetuity (which is perfectly accurate) as inaccurate, or at least obsolete. This accounts for the confused statement of the rules governing contingent remainders given by Lord St. Leonards in *Cole* v. *Sewell*, on which Mr. Jarman and Mr. Gray have commented.

(*n*) *Ante*, p. 326.

(*o*) [1915] 1 Ch. 810, where *Re Norton*, [1911] 2 Ch. 27, is explained.

(*p*) [1919] 1 Ir. R. 205.

it must now be accepted as good law until it is overruled by the Court of Appeal.

Distinction where the gift over is to arise on a double contingency.

(I) ALTERNATIVE LIMITATIONS.—Care should be taken to distinguish between cases such as those referred to in the preceding section, and those in which the gift over is to arise on an alternative event, one branch of which is within, and the other beyond, the prescribed limits; so that the gift over will be valid, or not, according to the event (*q*). Thus, in *Longhead* v. *Phelps* (*r*), where trusts were declared of a term, in case of the death of A without leaving issue male, or in case such issue male should die without issue, the Court held it clear that, the first contingency having happened, the trusts of the term were valid without reference to the other contingency.

Other instances of alternative limitations good or not in the event.

Leake v. *Robinson.*

In *Leake* v. *Robinson* (*s*), too, certain stock and moneys were bequeathed to W. R. R. for life, and, after his decease, to the child or children of the said W. R. R. who, being a son or sons, should attain the age of twenty-five, or being a daughter or daughters, should attain that age or be married with consent; and in case the said W. R. R. should happen to die without leaving issue living at the time of his decease, or, leaving such, they should all die before any of them should attain twenty-five if sons, and if daughters, before they should attain such age or be married as aforesaid, then to the brothers and sisters of W. R. R. on their attaining twenty-five if a brother or brothers, and if a sister or sisters, on such age or marriage as aforesaid. W. R. R. died without leaving issue, and it was not contended that, in the circumstances which had happened, the bequest over to the brothers and sisters was void, in reference to the event on which it was limited; though it was held that, as the bequest to the brothers and sisters included all who were living at the death of W. R. R. (*t*), it was clearly void from the remoteness of the bequest itself. Had W. R. R. left any issue, the event also would have been too remote.

Goring v. *Howard.*

In *Goring* v. *Howard* (*u*), there was a bequest of personal

(*q*) See the same principle applied to a different species of case: *Tregonwell* v. *Sydenham*, 3 Dow, 194; *ante*, p. 281, n. (*k*).

(*r*) 2 W. Bl. 704. *Crompe* v. *Barrow*, 4 Ves. 681, is commonly cited to the same point. But in that case there was no question of remoteness, the appointor's son C. B. being the child of a former marriage, *i.e.*, born before the creation of the power. If otherwise, the alternative gift over, if C. B. should die and leave no child surviving him (which was held good), would in fact have been too remote; for the vesting would have been suspended until the death of an unborn person. It is probable that a similar explanation may be given of *Re Lord Sondes' Will*, 2 Sm. & Gif. 416, *sc.* that Charlotte Palmer was living at the creation of the powers.

(*s*) 2 Mer. 363.

(*t*) *Vide ante*, p. 305.

(*u*) 16 Sim. 395; and see *Minter* v. *Wraith*, 13 *ibid.* 52.

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property upon trust for the testator's grandson G. G., and his brothers and sisters equally for their lives, and after the decease of any of the grandchildren to pay his or her share to his or her issue, if any, till they attain the age of twenty-five, and then to transfer to them their parent's share equally; and in case any of the grandchildren should die without leaving issue at his or her decease and without having obtained a vested interest, then the share of the grandchild so dying to go to the survivor or survivors, and to be payable and transferable as before mentioned; G. G. died a bachelor, and his brothers and sisters were held entitled to his share of income for their lives, in the alternative that had happened of no child of G. G. being alive at his decease, though the gift to such a child, had there been one, would have been too remote.

Monypenny v. *Dering.*

So in *Monypenny* v. *Dering* (*x*), where there was a devise in trust for P. M. for life, and after his decease in trust for his first son for life, and after the decease of such first son, "upon trust for the first son of the body of such first son and the heirs male of his body, and in default of such issue upon trust for all and every other the son and sons of the body of the said P. M., severally and successively according to seniority of age, for the like interests and limitations as I have before directed respecting the first son and his issue, and in default of issue of the body of P. M., or in case of his not leaving any at his decease, upon trust for T. M. for life," with remainders over: Lord St. Leonards held that the limitation to the unborn son of an unborn son of P. M., being itself void, invalidated the remainders depending upon it; but that the remainder to T. M., and the subsequent remainders, were good in the alternative event, which had happened, of P. M. not leaving any issue at his decease.

Cambridge v. *Rous.*

In *Cambridge* v. *Rous* (*y*), the testatrix bequeathed property upon trust for her sister A for life, and after her death upon trust for A's children at twenty-seven, with a gift over in the event of A not having any child or of all her children dying under twenty-seven: A never had any children, and it was held that the gift over took effect.

Re Bowles.

The principle laid down in the authorities above cited was followed in *Re Bowles* (*z*), where certain powers, which, if they had been exercised, might (as it was assumed) have made the ultimate gift invalid, were, in fact, not exercised.

(*x*) 2 D. M. & G. 145. See also *Hodgson* v. *Halford*, 11 Ch. D. 959.
(*y*) 8 Ves. 12; 25 Bea. 409.
(*z*) [1905] 1 Ch. 371; approved in *Re Davies and Kent's Contract*, [1910] 2 Ch. 35.

Miles v. *Harford.*

In *Miles* v. *Harford* (*a*), a testator devised freeholds to A and his issue male in strict settlement, with a shifting clause in the event of A or any of his issue male coming into possession of another estate, and bequeathed leaseholds upon corresponding trusts. A came into possession of the other estate, and it was held by Jessel, M.R., that the shifting clause, being divisible, took effect as to the leaseholds.

Re Davey.

In *Re Davey* (*b*), the testator made certain provision of part of his residuary estate for his nephew R. D. during his life, and as to all the residue gave the same upon trust for the first son of R. D. as should attain twenty-one (provided he should be christened John or assume the name of John Davey), and in default of any such son upon trust for the first son of either of the daughters of R. D. who should attain twenty-one (provided as aforesaid), and in default of any such son of a daughter, then in trust as to one half for the first daughter of R. D. who attains twenty-one, and as to the other half for charities, and in case of the death of R. D. without leaving lawful issue then the whole upon trust for certain charities. R. D. never had any issue. It was held that the trust for the first son that should attain twenty-one of any daughter of R. D. was void for remoteness, and that the subsequent trust of one half for the first daughter of R. D. who should attain twenty-one, and of the other half for charities was void because limited to depend on the previous limitation which was void or too remote, but that the ultimate trust for the charities was an alternative and independent gift upon an event ascertainable at the death of R. D. and therefore good.

Dividing or "splitting" a gift over.

In all these cases the testator had himself expressed the alternative contingency, but it often happens that a testator frames a gift over to take effect on an event which really includes two contingencies, one within, the other beyond, the limits allowed by law, and that the former happens. In such a case, the Courts refuse to divide or split the event, and the gift over consequently fails.

A well-known example of this construction is *Proctor* v. *Bishop of Bath and Wells* (*c*), stated above. In that case, if the testator had directed the gift over to take effect in the event of

(*a*) 12 Ch. D. 691. The M.R. also decided in the plaintiff's favour on the ground that the trust of the leaseholds was an executory one. Compare *Harding* v. *Nott*, 7 E. & B. 650, where the person named in the shifting clause died without coming into possession of the other estate, and the gift over failed : *ante*, p. 277.

(*b*) [1915] 1 Ch. 837.

(*c*) 2 H. Bl. 358, *ante*, pp. 324, 325.

T. P. having no son, or of his having no son who should take holy orders, the gift over would have taken effect, because he died without having had a son, but although the latter contingency included the former, the Court refused to separate them.

Lord Dungannon v. *Smith.*

Again, in *Lord Dungannon* v. *Smith* (*d*), where a testator devised leaseholds in trust for his grandson A for life, and after his death "to permit such person who for the time being would take by descent as heir male of the body of his said grandson to take the profits thereof until some such person should attain the age of twenty-one years, and then to convey the same unto such person so attaining the age of twenty-one years" absolutely, with a gift over "if no such person should live to attain" that age. The eldest son of A attained twenty-one in his father's lifetime, and claimed the property as having, in event, vested within legal limits. He contended that the devise might be read as containing separate gifts, to the eldest son, if he attained twenty-one, if not, to the first other male heir who should attain that age; but it was held otherwise, for there was no gift to the eldest son, except as one of a set or series of persons, any one of whom might come within the description, whether he was within the limit or not, and there was no authority for moulding or splitting the bequest in the manner proposed. The case was considered to be analogous to *Leake* v. *Robinson.*

The principle on which the Courts proceed in these cases was laid down by Jessel, M.R., in *Miles* v. *Harford* (*e*), with his usual clearness and accuracy: "On a gift to A for life, with a gift over in case he shall have no son who shall attain the age of twenty-five years, the gift over is void for remoteness. On a gift to A for life, with a gift over if he shall have no son who shall take priest's orders in the Church of England, the gift over is void for remoteness; but a gift superadded, 'or if he shall have no son,' is valid, and takes effect if he has no son; yet both these events are included in the other event, because a man who has no son, certainly never has a son who attains twenty-five, or takes priest's orders in the Church of England; still, the alternative event will take effect, because that is the expression. The testator, in addition to his expression of a gift over, has also expressed another gift over on another event, although included in the first event, but the same judges who have held that the second gift over will take effect where it is expressed, have held that it will not take effect if it is not expressed. . . . That is

(*d*) 12 Cl. & F. 546. See also the judgment of Sir E. Sugden in *Ker* v. *Dungannon*, 1 Dr. & War. 509.

(*e*) 12 Ch. D. 691.

what they mean by splitting : they will not split the expression by dividing the two events."

Re Bence.

In *Re Bence* (*f*), the testator gave his real and personal estate to trustees upon trust as to one-fifth share for the testator's daughter B for life, and after her death for such child or children of B as should attain twenty-one, and also such child or children of any son or daughter of B dying under the age of twenty-one as should attain twenty-one or marry, and the testator declared that if B should die without leaving any lawful issue who should live to attain a vested interest, her share should go over. B died without ever having had a child, but it was held that the gift over could not be split so as to make it take effect in that event, because the gift over was single in point of expression, although it included two events, and although that one of the two events which happened was within the limits of the Rule against Perpetuities (*g*).

Doctrine of *Pelham* v. *Gregory.*

If personal property is given to A for life, with remainder to his sons successively in tail male, and, in default of such issue, to B for life, with remainder to his sons successively in tail male, and A and B both die, A having no son, the first son of B will take (*h*). Mr. Jarman does not treat this as an exception to the ordinary mode applying the Rule against Perpetuities (*i*). Mr. Gray thinks that it is an instance of the law splitting a gift which has not been split by the testator (*k*).

Exception.

The principle that the Court will not divide the events on which a gift over is to take effect, does not apply where, in the event which has happened, the gift over can take effect as a contingent remainder, although if the other event had happened it would have been void as an executory devise.

Evers v. *Challis.*

This exception was established by the decision in *Evers* v. *Challis* (*l*). In that case the testator devised four houses in trust for his daughter Elizabeth for life, and after her decease to such of her children as being sons should attain the age of twenty-three years, or being daughters should attain the age of twenty-one years, equally as tenants in common in fee; and in case all the

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(*f*) [1891] 3 Ch. 242. It should be noted that the limitations of the will on which the case of *Evers* v. *Challis* was decided are not accurately stated in the judgment of the Court of Appeal in *Re Bence*. In *Re Johnson*, 111 L. T. 130, the contingency could not be split into two separate contingencies.

(*g*) *Re Harvey*, 39 Ch. D. 289, and *Re Hancock*, [1901] 1 Ch. 482, *S. C.*, s. n. *Hancock* v. *Watson*, [1902] A. C. 14, are to the same effect.

(*h*) *Pelham* v. *Gregory*, 3 Br. P. C. 204, *post*, p. 1164.

(*i*) *Post*, p. 1164.

(*k*) Gray on Perp. § 356.

(*l*) 7 H. L. C. 531.

Evers v. *Challis.*

children of Elizabeth should die, if a son or sons, under the age of twenty-three years, or, if a daughter or daughters, under the age of twenty-one, or if she should have none, then he devised the property in trust for his son John and his daughters Sarah and Ann equally for their respective lives, and at their respective deaths he devised the share of the one dying to his or her children who being sons should attain twenty-three, or being daughters should attain twenty-one, as tenants in common in fee; and in case of the death of his son or either of his said two daughters without leaving a child who being a son should attain twenty-three, or being a daughter should attain twenty-one, he devised the third share of the one so dying to the children of the others in the same manner as before. Elizabeth died in 1838 without ever having had a child, and in 1847 Ann died without ever having had a child. The son John had two daughters, one of whom, M. A. E., attained twenty-one during the life of Ann. Two questions were raised: first, whether the gift over on the death of Elizabeth was good; and, secondly, whether the gift over on the death of Ann was good. The Court of Q. B. decided both questions in the affirmative (*m*). As to the first, they held (in accordance with the authorities before stated) that if Elizabeth had had a child, although he did not attain the prescribed age, the gift over would have been void for remoteness, but that in the event which happened of her never having had a child, the gift took effect as an alternative contingent remainder. As to the second, the Court decided that here also the gift over took effect, although the event of her never having had any children was not actually expressed, being of opinion, upon the authority of *Jones* v. *Westcomb* (*n*) and similar cases, that wherever there was a gift over on a class dying within a particular age, it took effect if that class never came into existence. In the Exchequer Chamber the decision on the second point was reversed, the Court, without denying the authority of *Jones* v. *Westcomb*, applying the same principle to the splitting of one set of words into two contingencies, that Sir W. Grant, in *Leake* v. *Robinson*, applied to the splitting of a class. Alderson, B., who delivered the judgment of the Court, said (*o*): "The true meaning of the devise is, in every event which can happen in which Ann dies leaving no children if male who attain twenty-three, or if female who attain twenty-one, I give the estate over. That is what he says, and that is what he means. He includes all those events in one clause. Some

(*m*) 18 Q. B. 224.
(*n*) 1 Eq. Ca. Abr. 245, *post*, p. 2131.
(*o*) 18 Q. B. p. 248.

are legal, some are illegal. How is the Court to sever these events, which the testator has expressly joined together, without making a new will? The principle seems, therefore, to be against splitting such a devise when we are considering the question whether it is a legal one. Now this question, it is conceded, must be determined as on reading the will at the instant of the testator's death. Do the cases cited affect this principle? On looking over them we find in all of them that the devise in any event was legal, and that it was competent for the testator to make it."

Apart from the question of remoteness, it was admitted by the Exchequer Chamber that *Jones* v. *Westcomb* was full and sufficient authority for construing the will as was done in the Court of Q. B.; what prevented the Court from applying the doctrine laid down in *Jones* v. *Westcomb* to the case before them, was that, assuming the gift over to be an executory devise and nothing more, there was a possibility of the gift over taking effect on a remote contingency, and this vitiated the whole limitation, on the principle that in applying the Rule against Perpetuities, possibilities, and not actual events, must be considered (*p*).

Evers v. *Challis.*

On appeal to the House of Lords (*q*), the decision of the Exchequer Chamber was reversed, and it was held that M. A. E. took a share of the property under the gift over on the death of Ann, although the contingency of Ann's never having had any children was not expressed. Wightman, J., in giving the opinion of himself and several of his brother Judges, who were summoned to advise the House of Lords, said: "No case or authority has been cited to show that where a devise over includes two contingencies, which are in their nature divisible, and one of which can operate as a remainder, they may not be divided, although included in one expression; and our opinion does not at all conflict with the authority of *Jee* v. *Audley* and *Proctor* v. *Bishop of Bath and Wells*, in neither of which cases was it possible for the limitation over to operate as a remainder." In other words, the gift over took effect as if the limitation had been to Ann for life, with remainder to her children who attained the specified ages, with remainder to the children of John who attained the specified ages. "Whether the result should be to give the estate to her [Ann's] own child, or to the children of her brother and sister, in either case the gift must take effect as a remainder, for no prior estate is divested or displaced" (*r*).

(*p*) *Ante*, p. 270.
(*q*) 7 H. L. C. 531.
(*r*) *Per* Lord Cranworth, 7 H. L. C., at p. 551.

CHAPTER X.

Watson v. *Young.*

In *Watson* v. *Young* (*s*), the testator devised land in trust for A for life, and after his death in trust for his children who should reach twenty-one, and the issue of any child dying under twenty-one who should reach twenty-one, with a gift over in case there should be no child nor the issue of any child of A who should live to reach twenty-one. A had no children, and Pearson, J., held that the gift over was divisible into two alternative gifts, one in the event of A having no child, and the other in the event of no child or issue of a child of A attaining twenty-one, and he held that the former event having happened, the gift over was good. The learned Judge decided the case on the authority of *Evers* v. *Challis*, but as the gift over in the case of *Watson* v. *Young* did not take effect as a contingent remainder, it seems clear that the decision of Pearson, J., was wrong (*t*).

Quasi-entail of personalty.

When, before 1926, personal property is bequeathed to a series of persons not *in esse*, by words which would create successive estates tail if the subject of the gift were real estate, and the first person does not come *in esse*, the next will take, under the doctrine laid down in *Pelham* v. *Gregory* (*u*) stated above (*x*).

(K) MODIFYING AND QUALIFYING CLAUSES—SUBSTITUTION—CONDITIONS, ETC.—The cases in which clauses of accruer, shifting clauses, and gifts over have been held void under the Rule, have been already referred to (*y*).

Clauses illegally modifying previous absolute gifts rejected.

Mr. Jarman remarks (*z*) that "though the Courts will not violate the established rules of construction for the sake of bringing a gift within legal limits, yet an anxiety to prevent a testator's dispositive scheme from proving abortive, on account of its remoteness, is plainly discoverable throughout the cases. To this anxiety we may ascribe the rule, which recent cases seem to establish, that where a testator has by his will made an absolute bequest in favour of unborn persons, and has afterwards by a codicil revoked such bequest, and in lieu thereof given to the same legatees life interests only, with remainder to their children (which substituted bequest, of course, would be void as to the children), the codicil may be rejected, and the legatees take the interests originally given them by the will (*a*).

(*s*) 28 Ch. D. 436.
(*t*) See *Re Bence*, [1891] 3 Ch., at p. 251.
(*u*) 3 Bro. P. C. 204.
(*x*) *Ante*, p. 333.
(*y*) *Ante*, pp. 277, 320.
(*z*) First edition, p. 256.
(*a*) *Arnold* v. *Congreve*, 1 R. & Myl. 209. The actual decision in this case was wrong as the grandchildren were born in the lifetime of the testator (*Knapping* v. *Tomlinson*, 12 W. R. 784; *Re Russell*, [1925] 2 Ch. 698; Gray, p. 371), but the principle for which Mr. Jarman cites it is correctly laid down in it.

"And this rejection of qualifying clauses ineffectually attempted to be engrafted on a previous absolute gift, equally obtains where the whole is contained in the same testamentary paper, and in spite, too, of the principle hereafter discussed, which prefers the posterior of two inconsistent clauses; it being considered (for this is the ground upon which alone the construction can be defended) that the testator intends the prior absolute gift to prevail, except so far only as it is effectually superseded by the subsequent qualified one (*b*). As in *Carver* v. *Bowles* (*c*), where a testatrix, having under her marriage settlement a power of selection in favour of her children, appointed the settled fund to her five children, two sons and three daughters, absolutely in equal shares; and then proceeded to declare that the one-fifth so appointed to each of her daughters, she did thereby, so far as she lawfully might or could, order and appoint should be held upon trusts for the daughter for her separate and inalienable use for life; and after her decease for her children, and in default of children, subject to her general power of appointment, and in default of appointment, for her next-of-kin. Sir John Leach, M.R., held that the words of the appointment were sufficient to vest the shares absolutely in the daughters; that the attempt to restrict their interest by limitations to their issue, being inoperative, did not cut down the absolute appointment; but that it was competent to the donee of the power to limit the interests which he appointed to his daughters to their separate use, and to restrain them from anticipation or alienation" (*d*).

Carver v. *Bowles.*

The same principle was acted on in *Kampf* v. *Jones* (*e*), *Ring* v. *Hardwick* (*f*), *Lassence* v. *Tierney* (*g*) (a leading case on the doctrine), and other cases (*h*), the latest being *Hancock* v. *Watson* (*i*).

Lassence v. *Tierney.*

This principle, however, is only applicable where the restriction or modification can be separated from the original gift (*k*).

(*b*) On the question whether the prior gift is absolute or not; see *Whittell* v. *Dudin*, 2 J. & W. 279, and other cases cited *post*, p. 1432. And see and consider *Doe* d. *Blomfield* v. *Eyre*, 5 C. B. 713, cited *post*, p. 1409.

(*c*) 2 R. & My. 306. See also *Church* v. *Kemble*, 5 Sim. 525.

(*d*) The M. R. therefore thought that this restriction took effect; but it is now settled that it is void for remoteness and will be rejected: *Fry* v. *Capper*, Kay, 163; *Armitage* v. *Coates*, 35 Bea. 1; *Re Teague's Settlement*, L. R. 10 Eq. 564; *Re Cunynghame's Settlement*, L. R. 11 Eq. 324; *Re Ridley*, 11 Ch. D. 645; *Shute* v. *Hogge*, 58 L. T. 546; *Whitby* v. *Mitchell*, 44 Ch. D. 85, except in those cases where the gifts are separable: *post*, p. 338.

(*e*) 2 Kee. 756.

(*f*) 2 Bea. 352.

(*g*) 1 Mac. & G. 551.

(*h*) *Hodson* v. *Micklethwaite*, 2 Dr. 294; *Harvey* v. *Stracey*, 1 Dr. 73; *Stephens* v. *Gadsden*, 20 Bea. 463; *Courtier* v. *Oram*, 21 Bea. 91; *Salmon* v. *Salmon*, 29 Bea. 27; *Cooke* v. *Cooke*, 38 Ch. D. 202; *Re Boyd*, 63 L. T. 92; *Dowglass* v. *Waddell*, 17 L. R. Ir. 384.

(*i*) [1902] A. C. 14, in which the House of Lords affirmed the decision of the C. A. (*Re Hancock*), [1901] 1 Ch. 482. See *post*, pp. 1152, 1432.

(*k*) *Whitehead* v. *Rennett*, 22 L. J. Ch. 1020; *Re Crawshay*, 43 Ch. D. 615.

CHAPTER X.

Void gift by way of substitution.

On the same principle, if there is a gift to a class of persons ascertainable within due limits, followed by a substitutional gift to take effect within a period exceeding that allowed by the Rule, the substitutional gift is void, and the original gift remains (*l*).

Void divesting clause, or gift over.

So in the case of a divesting clause, or gift over, which is void for remoteness, the result may be that the original gift becomes absolute (*m*).

Possession of vested gift postponed beyond age of twenty-one.

Where there is an absolute gift to A, followed by a direction, made for A's supposed benefit, postponing possession until the attainment by A of some age exceeding twenty-one, this direction is void, not because it transgresses the Rule, but because any direction postponing the enjoyment of a vested and indefeasible interest beyond the age of twenty-one is repugnant to the nature of an absolute interest (*n*).

Restraint on anticipation.

It has been held in several modern cases, that where an interest in property is given to an unborn daughter of a living person, with a clause against anticipation, the restraint on anticipation is void, and that consequently, on the principle above stated, the gift of the interest is good, the restraint alone being rejected (*o*).

Separable gifts.

When gifts are made to several persons by one description, but the gift to one is not affected by the existence or non-existence of the others, the gifts are separable, and if modifying clauses are not too remote when applied to the gifts to some of these persons, but are too remote when applied to the gifts to the others, they will be operative in the former cases, and disregarded in the latter (*p*). Thus, where there is a gift to such of the children of A as shall be living at the death of B, followed by a direction that the share of each daughter shall be settled upon her for life, with remainder to her children, here the limitation in

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(*l*) *Baldwin* v. *Rogers*, 3 D. M. & G. 649; *Packer* v. *Scott*, 33 Bea. 511; *Goodier* v. *Johnson*, 18 Ch. D. 441, stated *ante*, p. 307.

(*m*) *Harding* v. *Nott* and other cases cited *ante*, p. 27.

(*n*) See *ante*, p. 274; Gray, §§ 120-21. As to the effect on a gift to a class, see *Kevern* v. *Williams*, 5 Sim. 171; *Blease* v. *Burgh*, 2 Bea. 221, and other cases cited *post*, pp. 1652 *seq.*

(*o*) *Fry* v. *Capper*, Kay, 163; *Armitage* v. *Coates*, 35 Bea. 1; *Re Teague's Settlement*, L. R. 10 Eq. 564; *Re Cunynghame's Settlement*, L. R. 11 Eq. 324. The principle of these cases (holding the restraint to be bad) was disapproved by Jessel, M.R., in *Re Ridley*, 11 Ch. D. 645, and he followed them reluctantly. It seems clear that they involve a confusion between gifts which are void for remoteness, and restraints which are void because they hinder alienation. A gift to a married woman may be subject to a restraint on anticipation, and the fact that the restraint may last beyond the period allowed by the Rule against Perpetuities cannot make any difference. "The true doctrine is believed to be that a future estate, not in itself too remote, can be subjected to the same restraints to which a present estate can be subjected" (Gray, Perp. § 437). The doctrine stated in the text must, however, be considered as adopted by the Court of Appeal; see *Whitby* v. *Mitchell*, 44 Ch. D. 85, although the point was not argued.

(*p*) Gray, Perp. § 441.

favour of the children of daughters is good in the case of those daughters who are born during the testator's lifetime, and bad as to those born subsequently (*q*). So where there is a gift to the daughters of the testator's children with a restraint on anticipation, the restraint is good as to those daughters who are born in the testator's lifetime, and void as to those born afterwards (*r*).

Restraint on anticipation good during prior life interests.

In *Re Millward* (*s*), a testator gave his residuary estate to his wife, two daughters, and a son for life (the interests of the wife and daughters to be without power of anticipation), and after the death of the survivor he gave his estate to the born and future children of his son in equal proportions. By a codicil he imposed a restraint on anticipation on all females taking any interest under his will. The survivor of the wife, daughters, and son died in January, 1902. The son left five children living at his death, of whom two were married women : it was held by Joyce, J., that the restraint on anticipation was valid as to income and *corpus* during the existence of the prior life interests, and that it determined when the property fell into possession in January 1902.

Entailed personalty.

Where personal property is settled upon trust to follow entailed realty, with a proviso that it shall not vest absolutely in any tenant in tail who dies under twenty-one, this proviso will, it seems, as a general rule, be construed as part of the primary trust, so that the whole trust is void, unless it is confined to tenants in tail by purchase (*t*).

Construction of will not affected by rule.

(L) Construction.—The principle that the Court will not depart from the established rules of construction in order to render a disposition valid under the Rule, has been already referred to in connection with gifts to classes (*u*). The principle is recognised in numerous cases (*x*). "It is against the settled rules of construction to strike out any words from a will because they offend against the perpetuity rule. For all purposes of construction, the will must be read as if no such rule existed. Any dispositions which, so reading and construing it, are found to be the testator's wishes, must be taken to be his wishes, and if

(*q*) *Wilson* v. *Wilson*, 28 L. J. Ch. 95; *Re Russell*, [1895] 2 Ch. 698; *ante*, p. 313.

(*r*) *Herbert* v. *Webster*, 15 Ch. D. 610; *Re Ferneley's Trusts*, [1902] 1 Ch. 543; *Re Game*, [1907] 1 Ch. 276. The point seems to have been overlooked in *Re Michael's Trusts*, 46 L. J. Ch. 651, and *Re Ridley*, 11 Ch. D. 645. The doctrine stated in the text is, of course, open to the criticism expressed in n. (*o*).

(*s*) 87 L. T. 476.

(*t*) *Christie* v. *Gosling*, and other cases referred to *ante*, p. 322, and *post*, p. 670.

(*u*) *Ante*, p. 314.

(*x*) *Dungannon* v. *Smith*, 12 Cl. & F. 546.

those wishes offend against the rule, the gifts would fail, and must fail accordingly; but they are not the less part of his will, and to be resorted to as part of the context for all purposes of construction, as if no such rule had been established" (*y*). "You do not import the law of remoteness into the construction of the instrument by which you investigate the expressed intention of the testator. You take his words and endeavour to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect. I do not mean that, in dealing with words which are obscure and ambiguous, weight, even in a question of remoteness, may not sometimes be given to the consideration that it is better to effectuate than to destroy the intention; but I do say that if the construction of the words is one about which a Court would have no doubt, though there was no law of remoteness, that construction cannot be altered or wrested to something different, for the purpose of escaping from the consequences of that law" (*z*).

Accordingly, the Court refuses to strain the rules of construction in order to make a gift to a class valid (*a*), or to split a gift over if the testator has not done so (*b*).

But, as Mr Jarman points out (*c*), the Court has, especially in the older cases, often been consciously or unconsciously influenced by a desire to give effect to the intention of testators. Instances will be found in the doctrine which rejects modifying and qualifying clauses when too remote (*d*), and in the rule that in carrying out executory trusts the Court will, if possible, so modify them as to bring them within the limits of the Rule (*e*).

Construction of ambiguous clause.

And if a particular clause in a will is capable of two constructions, one of which will make it void under the Rule against Perpetuities, while the other will carry out the obvious intention of the testator, the latter construction is preferred (*f*). There

(*y*) *Heasman* v. *Pearse*, L. R., 7 Ch. at p. 283.

(*z*) *Per* Selborne, L.C., in *Pearks* v. *Moseley*, 5 A. C., at p. 719. See also *per* Wood, V.-C., in *Cattlin* v. *Brown*, 11 Ha. 375, and *per* Parker, J., in *Re Hume*, [1912] 1 Ch., at p. 698.

(*a*) *Ante*, p. 304.

(*b*) *Ante*, p. 331.

(*c*) *Ante*, p. 336.

(*d*) *Ante*, p. 336.

(*e*) *Ante*, p. 281. Mr. Gray thinks that this unconscious tendency influenced the decision in *Forth* v. *Chapman*, 1 P. Wms. 663, and other cases of that class. The cases of *Mogg* v. *Mogg*, 1 Mer. 654, *Leach* v. *Leach*, 2 Y. & C. C. C. 495, *Kevern* v. *Williams*, 5 Sim. 171, and *Elliott* v. *Elliott*, 12 Sim. 276, in which rules of construction appear to have been strained in order to avoid remoteness, are commented on by Mr. Gray (Perp. §§ 634 *seq.*).

(*f*) *Re Turney*, [1899] 2 Ch., p. 747. The same rule was stated by Lord Chelmsford in *Martelli* v. *Holloway* (L. R., 5 H. L. at p. 548), and by Farwell, L.J., in *Re Stamford and Warrington*, [1912] 1 Ch., at p. 365, and also acted on by him in *Re Mortimer*, [1905] 2 Ch. 502.

are numerous cases in which a gift which would have been void for remoteness if it had been construed to be contingent, has been held to be vested subject to be divested, and therefore good (*g*).

"So far as the law permits."

A testator sometimes declares that the dispositions of his will shall take effect "as far as the rules of law and equity permit," or that he makes them "so far as he lawfully or equitably can or may"; words of this kind are most frequently used in connection with gifts of personalty to go according to limitations of real estate. It was formerly supposed that such trusts were executory (*h*), but this doctrine has been long overruled (*i*), and it seems now settled that the presence of words of this kind does not justify the Court in putting a forced construction on the will in order to save the testator's provisions from the penalty of remoteness (*k*), unless the trust is really executory (*l*).

As to implying estates which would be too remote.

According to Mr Jarman (*m*), a further illustration of the leaning of the Courts against a construction which will defeat the testator's intention, is to be found in the "disinclination in the Courts to apply those liberal rules of construction which, in favour of the apparent intention, as collected from the context, operate to raise devises by implication, in the absence of words of positive gift, where the effect of such implication would be to impute to the testator a scheme of disposition at variance with the principle of law which regulates and restricts the period of vesting" (*n*).

Doctrine of *cy-près*.

But it is the doctrine of *cy-près* which, in Mr. Jarman's view, affords "the most striking illustration of the anxiety of the Courts to prevent the total disappointment of the testator's intention by the operation of the Rule against Perpetuities" (*o*). This, however, is not quite accurate, for historically there seems no doubt that the doctrine of *cy-près* is derived from the old rule forbidding the creation of unbarrable entails (*p*), and that it has nothing to do with the modern Rule against Perpetuities. Unless the doctrine can be explained on this theory, it is the solitary instance in which the Courts have disregarded an otherwise inflexible rule in order to give effect to the intention of

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(*g*) See the cases cited in the last note, and *post*, pp. 1339 *seq.*

(*h*) *Gower* v. *Grosvenor*, 5 Madd. 337; *Trafford* v. *Trafford*, 3 Atk. 347.

(*i*) See *Rowland* v. *Morgan*, 2 Ph. 764; *Portman* v. *Portman*, [1922] 2 A. C. 473. The cases are cited *post*, pp. 672 *seq.*

(*k*) *Tollemache* v. *Coventry*, 2 Cl. & F. 611; *Christie* v. *Gosling*, L. R., 1 H. L. 279; *Harrington* v. *Harrington*, L. R., 5 H. L. 87.

(*l*) See *Miles* v. *Harford*, 12 Ch. D. 691.

(*m*) First edition, p. 260.

(*n*) *Chapman* v. *Brown*, 3 Burr. 1626.

(*o*) First edition, p. 260

(*p*) *Ante*, p. 253.

CHAPTER X.

testators, and it is difficult to understand why this particular instance should have been selected.

Charitable gifts.

(M) EXCEPTIONS TO THE RULE.—(1) *Charitable Gifts.*—It is sometimes said that charitable gifts are an exception to the Rule (*q*), but this is inaccurate. A charitable trust creates a perpetuity in the primary sense of the word, and it follows that charitable gifts are an exception to the general principle of law which forbids the creation of inalienable and indestructible interests in property (*r*). It has even been held that property may be given to one charity, subject to a gift over, in an event which may never happen, to another charity (*s*). But these cases have nothing to do with the modern Rule against Perpetuities (*t*), which clearly applies to charitable gifts. Thus, a gift to a charity, conditional upon a future and uncertain event which may not happen within the period allowed by the Rule, is void (*u*). So, if property is given to a private individual, with a limitation in a remote contingency to a charity, this limitation is void (*x*). Conversely, if property is given to a charity, with a gift over in a remote contingency in favour of private persons, the gift over is void (*y*). But a gift of a fund for a charity may be made defeasible or determinable on an event which must or may happen after the expiration of the period allowed by the Rule, so that when that event happens, the fund reverts to the testator's estate; and an express direction by the testator that on the happening of the event the fund shall fall into his residue, does not offend against the Rule, because it is mere surplusage (*z*).

Resulting trust after gift to charity.

Accumulation for payment of debts,

(2) *Trusts for Accumulation.*—The Rule against Perpetuities does not apply to a trust for accumulation whereby a fund is to be created for payment of the testator's debts, or for the discharge of existing incumbrances on an estate, because such a

(*q*) Lewis, 663, 687 *seq.* This is one of the many instances of the mental confusion caused by the ambiguity of the word "perpetuity" which are to be found in Mr. Lewis's work: see *ante*, p. 258, n. (*z*).

(*r*) *Ante*, p. 248; *Thomson* v. *Shakespear*, 1 D. F. & J. at p. 407.

(*s*) *Christ's Hospital* v. *Grainger*, 1 Mac. & G. 460, *ante*, p. 250. Lord Cottenham's decision was expressly based on the doctrine of perpetuity in the primary sense of an inalienable interest. See Mr. Gray's remarks on the decision (§§ 599 *seq.*), and *ante*, p. 280, as to the decision in *Re Tyler*.

(*t*) Mr. Gray says, with great truth, that much confusion would have been avoided if the modern "Rule against Perpetuities" had been called the "Rule against Remoteness": Gray on Perp. §§ 2, 140, 589 *seq.*

(*u*) *Chamberlayne* v. *Brockett*, L. R. 8 Ch. 206; *Re Lord Stratheden and Campbell*, [1894] 3 Ch. 265; *Kingham* v. *Kingham*, [1897] 1 Ir. R. 170.

(*x*) *Company of Pewterers* v. *Christ's Hospital*, 1 Vern. 161; *Att.-Gen.* v. *Gill*, 2 P. W. 369; *Re Johnson's Trusts*, L. R., 2 Eq. 716; *Commissioners, &c.* v. *De Clifford*, 1 Dr. & War. 245.

(*y*) *Re Bowen*, [1893] 2 Ch. 491; *Re Barnett*, 24 T. L. R. 788.

(*z*) *Re Randell*, 38 Ch. D. 213; *Re Blunt's Trusts*, [1904] 2 Ch. 767, see *ante*, p. 252.

provision only prescribes a particular mode of paying the debts, and it may at any time be put an end to, either by the owner of the property paying them off, or by the creditors enforcing their claims (*a*).

But if the trust for payment of debts is preceded by or mixed up with other trusts, so that the amount applicable for payment of debts depends on the operation of trusts which are themselves too remote, as in *Scarisbrick* v. *Skelmersdale* (*b*), then the whole trust is void, including the trust for payment of debts.

or legacies.

A trust to accumulate rents to pay a legacy to an existing person is also good (*c*).

Trusts for accumulation for benefit of legatee.

An apparent exception to the Rule against Perpetuities occurs in the case of certain other trusts for accumulation. A trust to accumulate income for the benefit of a person who may not be ascertained within the period allowed by the Rule is, of course, void, but a trust to accumulate income for the benefit of some one to be ascertained within due limits, who can put an end to it at any time after his interest has vested, is not within the Rule (*d*).

Charity.

The same doctrine applies to a trust to accumulate for the benefit of a charity (*e*).

Thellusson Act.

The statutory law with regard to the accumulation of income is considered in the next chapter.

Equitable contingent remainders.

(3) *Contingent Remainders.*—There can be no doubt that the Rule applies to equitable contingent remainders (*f*).

Since 1925 all remainders are equitable. But the conversion of legal remainders into equitable interests, in accordance with the provisions of Part I of the 1st Schedule to the Law of Property Act, 1925, will not cause such interests (arising under wills coming into operation before 1926) to fail, if prior to 1926 they had been good or legal interests. It is therefore still necessary to consider the law as to legal remainders.

Apparent exception in the case of legal remainders.

With regard to legal contingent remainders, there are cases

(*a*) *Tewart* v. *Lawson*, L. R., 18 Eq. 490; *Lord Southampton* v. *Marquis of Hertford*, 2 V. & B. 54; *Marshall* v. *Holloway*, 2 Sw. 432; *Bateman* v. *Hotchkin*, 10 Bea. 426; *Bacon* v. *Proctor*, T. & R. 31; *Briggs* v. *Earl of Oxford*, 1 D. M. & G. 363. *Gilbertson* v. *Richards*, 5 H. & N. 453, is sometimes cited as an illustration of the principle above stated: see *per* Jessel, M.R., in *London & South Western Ry.* v. *Gomm*, 20 Ch. D. p. 577.

(*b*) 17 Sim. 187.

(*c*) *Williams* v. *Lewis*, 6 H. L. C. 1013.

(*d*) *Saunders* v. *Vautier*, Cr. & Ph. 240; *Gosling* v. *Gosling*, Johns, 265; *Oddie* v. *Brown*, 4 De G. & J. 179; see also *Re Trevanion*, [1910] 2 Ch. 538, as to stopping accumulations.

(*e*) *Wharton* v. *Masterman*, [1895] A. C. 186, overruling *dictum* of Wickens, V.-C., in *Harbin* v. *Masterman*, L. R. 12 Eq. 559; *Re Knapp*, [1929] 1 Ch. 341.

(*f*) *Abbiss* v. *Burney*, 17 Ch. D. 211. The curious result followed that equitable contingent remainders were subject to both the old and the new Rules against Perpetuities. Since 1925 all remainders are equitable.

in which they are clearly not within the modern Rule. Thus, if land is devised to A, a bachelor, for life, and on his death to the first son of his who attains twenty-five, this is a contingent remainder which will fail, unless at A's death there is a son who has attained twenty-five; if it vests at all, it must vest at A's death, and can, therefore, never be too remote. This case is, therefore, an apparent, and not a true, exception to the Rule.

Can a legal contingent remainder be void for remoteness?

Apart from this undisputed rule of law, the question whether a legal contingent remainder can be void for remoteness has been much discussed. It has been answered in the affirmative in two recent cases, by Kay, J., in *Re Frost* (*g*), and by Farwell, J., in *Re Ashforth* (*h*), but as both these cases ignore the older authorities, and the result of the decision of the Court of Appeal in *Whitby* v. *Mitchell* (*i*), they cannot be considered satisfactory.

Doctrine laid down by Mr. Fearne and others.

Before the decision in *Whitby* v. *Mitchell*, real property lawyers were divided into two schools on this question. The older school, headed by Mr. Fearne, held that contingent remainders are not subject to the modern Rule against Perpetuities, but are governed by the old Rule, which forbids the limitation of land to the unborn issue of a person in succession beyond the first generation (*k*). According to this school, the modern Rule was invented to restrict the creation of executory interests, and does not apply to contingent remainders, for these are governed by their own special rules, definitely fixed before the introduction of executory interests. In addition to Mr. Fearne (*l*), this school included Mr. Peter B. Brodie (*m*), Mr. Lewis Duval (*n*), Mr. Preston (*o*), Mr. Charles Butler (*p*) Lord

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(*g*) 43 Ch. D. 246.

(*h*) [1905] 1 Ch. 535. In *Whitby* v. *Von Luedecke*, [1906] 1 Ch. 783, the question was not argued.

(*i*) 44 Ch. D. 85.

(*k*) *Ante*, p. 253.

(*l*) After explaining (Cont. Rem. 429) that the invention of the modern Rule against Perpetuities was made necessary by the fact that executory devises are free from the restrictions imposed by the common law on contingent remainders, Mr. Fearne goes on to remark that "future and shifting uses, and other springing and executory interests *which are not remainders*, are to be considered as subject to the same limits and restrictions as executory devises." (Cont. Rem. 441, 10th edition; the italics are mine). Mr. Fearne's statement of the old Rule against Perpetuities will be found in the passage quoted above, p. 285. Mr Lewis entirely misunderstood Mr. Fearne's views on the subject, owing to his inability to see the difference between "perpetuity" and "remoteness." So far as I am aware, Mr. Fearne never uses "perpetuity" in its modern sense, as equivalent to "remoteness." [Note by Mr. C. Sweet.]

(*m*) The draftsman of the Fines and Recoveries Act, and probably the ablest real property lawyer who has ever lived.

(*n*) Mr. Lewis Duval was one of the most eminent conveyancers of his day. He and Mr. Brodie were two of the Real Property Commissioners, the others being Lord Campbell and Messrs. W. H. Tinney, John Hodgson, Samuel Duckworth, and John Tyrrell, all men of eminence in their profession. The Real Property Commissioners unanimously stated in their third report, as a familiar and unquestioned doctrine, that the Rule against Perpetuities

St. Leonards (*q*), Lord Brougham (*r*), Mr. S. M. Leake (*s*), Mr. Coventry (*t*), Mr. Burton (*u*), Mr. Joshua Williams (*x*), and Mr. H. W. Challis (*y*).

Mr. Lewis's theory.

The contrary view—that contingent remainders are subject to the modern Rule against Perpetuities—seems to have originated with Mr. Lewis : he denied the existence of the rule forbidding the limitation of land to two or more unborn generations in succession (established by the decision in *Whitby* v. *Mitchell*), and contended that it was merely an example or instance of the modern Rule against Perpetuities (*z*). But this, as Mr. Joshua Williams pointed out, involves an entire " misapprehension of the rule in *Whitby* v. *Mitchell*, which " is more stringent

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does not apply to contingent remainders : " All future interests, not being remainders, are restrained in their limits by the rules of law relating to perpetuities " (p. 29). The Commissioners recommended (p. 30) that the rule with regard to the failure of contingent remainders should be amended by enacting that every contingent remainder should take effect if the particular estate determined before the remainder vested, " becoming in that event liable to the rules prescribed for restraining perpetuities." This recommendation has been carried into effect by the Contingent Remainders Act, 1877, which thus confirms the correctness of the view held by the Commissioners.

(*o*) " No remainder can, in point of expression, be too remote, since the necessity that the remainder should vest during the particular estate, or *eo instante* that the particular estate determines, and the liability of a contingent remainder to be defeated by the merger, etc., of the particular estate, are a protection against the inconvenience of perpetuities " (Abst. ii. 114).

(*p*) " The remoteness of a remainder, however great, was no objection to it on its creation " (note to Fearne, Cont. Rem., p. 565, 10th ed.).

(*q*) " It is now perfectly settled that where a limitation is to take effect as a remainder, remoteness is out of the question " : *Cole* v. *Sewell*, 4 Dr. & W. at p. 28.

(*r*) " I was a good deal surprised to find that there was a question raised about the remoteness of the limitation. . . . It [the suggestion in question] opened to my mind a new and strange view of the law, applying that to contingent remainders which I had always understood must be, from the very nature of the thing, confined to springing uses and executory devises " : *Cole* v. *Sewell*, 2 H. L. C. 230.

(*s*) Prop. in Land, 334, 335, n. (1st ed.).

(*t*) " The Rule against Perpetuities does not apply to remainders " : Watkins, Convey. (6th edition, by Coventry), 176, n.

(*u*) Comp. § 782.

(*x*) Mr. Joshua Williams's statement of the law, which was adopted as accurate by Kay, J., and the Court of Appeal in *Whitby* v. *Mitchell* (44 Ch. 85), will be found in the 12th edition of his treatise on Real Property, pp. 269 *seq.*, 318 *seq.* It is to the effect that there are only two rules governing the creation of contingent remainders, namely, the rule requiring that the seisin shall never be without an owner, and the rule that if an estate is given to an unborn person for life, followed by any estate to any child of such unborn person, the latter limitation is void; Mr Williams goes on to point out that it is " in analogy to the restrictions thus imposed on contingent remainders that the law has fixed the following limit to the creation of executory interests," namely, the modern Rule against Perpetuities. The matter is stated in the same way by Lord Kenyon in *Long* v. *Blackall*, 7 T. R. 100.

(*y*) " Whether the Rule against Perpetuities applies (apart from express statutory enactment) to legal limitations by way of remainder, is one of those questions which ought never to have arisen. It implies an anachronism which may be said to trench upon absurdity " (Real P. 183).

(*z*) *Lewis* on Perp. 420; Supp. 97 *seq.*

CHAPTER X.

than that which confines executory interests" (*a*), for it absolutely forbids the limitation of land by way of remainder to the unborn issue of a person for two or more generations in succession; even if such a limitation is restricted to the issue born within a life in being, it is void (*b*).

Mr. Jarman's views.

Mr. Jarman was unable to make up his mind which view was correct. He was misled by the ambiguity of Lord St. Leonards' remarks in *Cole* v. *Sewell*, with reference to the old rule forbidding the limitation remainders "on too remote a possibility," into supposing that Lord St. Leonards considered the old rule to be "exploded"; with the result, as Mr. Jarman thought, that in Lord St. Leonard's opinion, "all contingent remainders are withdrawn from every species of perpetuity-restraint" (*c*). But this was not Lord St. Leonard's opinion, for in *Monypenny* v. *Dering*, he explained that in *Cole* v. *Sewell* he never meant to deny the existence of the rule forbidding successive limitations to unborn generations (*d*). It was under the influence of this error (*e*) that Mr. Jarman stated his own conclusion thus (*f*): "It is submitted, therefore, that both principle and authority justify the questioning the proposition that remainders owe obedience to no other law than that which requires that they should take effect at the instant of the determination of the particular estate. They are, it is conceived, either subject to the old doctrine, directed against remote possibilities, or the modern Rule against Per-

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(*a*) Real Prop. 275, and Appendix F (12th ed.).

(*b*) Mr. Lewis's error arose partly from the unfortunate and inaccurate theory that the rule forbidding the limitation of land to two unborn generations in succession is derived from the doctrine of double possibilities, and partly from Mr. Lewis's having overlooked the change in the meaning of the word "perpetuity" during the first half of the nineteenth century. In the sixteenth, seventeenth, and eighteenth centuries the usual meaning of "perpetuity" was a limitation of land to unborn generations in succession, by way of unbarrable entail (*ante*, p. 255). Mr. Lewis's ignorance of this fact led him to cite the well-known passage in Mr. Fearne's book (to the effect that a limitation by way of contingent remainder to two unborn generations in succession tends to a perpetuity, and that the second remainder is, therefore, "absolutely void," *ante*, p. 257) as meaning that in Mr. Fearne's opinion a contingent remainder can be void for remoteness, although it is obvious to anyone familiar with the history of the subject that in this passage Mr. Fearne was not referring to the modern Rule against Perpetuities, but was stating the rule now established by the decision in *Whitby* v. *Mitchell*. Mr. Lewis's remarks on the subject, and on the cognate subject of the doctrine of *cy-près* (Prep. Supp., p. 136 *seq.*), show an ignorance of the devices invented by landowners in their efforts to re-establish unbarrable entails during the fifteenth and sixteenth centuries, which is surprising in a man of his industry and learning. These devices are referred to in detail by the Real Property Commissioners (Third Report, pp. 30-31).

(*c*) First edition of this work, Vol. II. p. 730.

(*d*) 2 D. M. & G. at p. 168; and see Sugden, Powers, 393.

(*e*) It must be admitted that the error was quite excusable, owing to the vagueness of the Chancellor's language in *Cole* v. *Sewell*. See *ante*, p. 328, note (*m*).

(*f*) First edition, Vol. II. p. 733. Mr. Jarman's remarks on *Cole* v. *Sewell* are printed at length in an appendix to the fourth edition of this work.

petuities, unless these are identical as may be contended with much plausibility, although it is not necessary to go to this extent in support of the denial of the exemption of remainders from all perpetuity-restraint."

Decision in *Whitby* v. *Mitchell*.

As it is now settled by the decision of the Court of Appeal in *Whitby* v. *Mitchell*, that contingent remainders are "subject to the old doctrine directed against remote possibilities," it follows, according to Mr. Jarman, that they are not subject to "the modern Rule against Perpetuities." It is equally clear, from the judgments in that case, that the two rules are not identical, as suggested by Mr. Jarman.

Result.

In short, the effect of the decision in *Whitby* v. *Mitchell* is to affirm the correctness of the view held by Mr. Fearne and his followers (including Mr. Joshua Wiliams), and to demonstrate the error of Mr. Lewis and his followers (including Mr. Gray) in denying the existence of the old Rule against Perpetuities.

Re Frost.

The question came before Kay, J., in *Re Frost* (*g*), and he held that contingent remainders are subject to the modern Rule against Perpetuities. Two remarks may be made upon the decision. In the first place, the learned Judge entirely disregarded the opinion of Mr Joshua Williams on the point, although in deciding *Whitby* v. *Mitchell* (*h*), five months previously, he said: "I do not want any higher authority than that of the late Mr. Joshua Williams, who was certainly one of the best real property lawyers that have existed in my lifetime." In the second place, Mr. Justice Kay fell into the error of supposing that when Mr. Fearne (in the passage already quoted (*i*) referred to the old Rule against Perpetuities, he had in mind the modern Rule against Remoteness. This error deprives the decision of all value.

Re Ashforth.

The decision of Farwell, J., in *Re Ashforth* (*k*) is also unsatisfactory. In the first place, the learned Judge seems not to have been aware that the rules governing legal contingent remainders are different from those governing equitable contingent remainders, for he remarked that the case before him was "really undistinguishable from *Garland* v. *Brown*" (*l*). But in *Garland* v. *Brown* the limitations were equitable, and no one denies that equitable remainders are subject to the modern Rule. However, in a later part of his judgment, the learned Judge treated the limitations in the case before him as legal, which they

(*g*) 43 Ch. D. 246; *Re Park's Settlement*, [1914] 1 Ch. 595.
(*h*) 42 Ch. D. 494.
(*i*) *Ante*, p. 257.
(*k*) [1905] 1 Ch. 535.
(*l*) 10 L. T. 292.

clearly were, being, in effect, to trustees and their heirs during the lives of A, B, and C and their children; after the death of all the children except one, the testatrix devised the land to such surviving child in tail. Now it is by no means clear that land can at common law be limited for an estate *pur auter vie* during the life of an unborn person (*m*), and if it cannot, then the limitation in *Re Ashforth* to the surviving child was not a contingent remainder, but an executory devise. Whether this is so or not, the judgment, if one may say so with respect, fails to notice the essential difference between the "perpetuities" referred to in the old books, and those remote limitations by way of shifting use and executory devise, against which the modern Rule against Perpetuities is directed; and this is the more strange, because the difference is pointed out in Lord Nottingham's judgment in the *Duke of Norfolk's Case*, referred to by Farwell, J. Nor does the attention of the learned Judge seem to have been called to the fact that, down to the middle of the nineteenth century, the most eminent real property lawyers were practically unanimous in thinking that the modern Rule does not apply to legal contingent remainders. On a question of this kind the opinion of Mr. Fearne, Mr. Butler, and the Real Property Commissioners, is entitled to some consideration. Again, the statement of the learned Judge (*n*), that the opinion of Mr. Joshua Williams on the question has been displaced by Mr. Gray, must have been made *per incuriam*, for the opinion of Mr. Gray, that contingent remainders are subject to the modern Rule, is based on the assumption that there never was a rule forbidding the limitation of estates to two or more unborn generations in succession (*o*); this assumption was held to be erroneous by the Court of Appeal in *Whitby* v. *Mitchell*, in which case the Court adopted Mr. Joshua Williams's views on the subject. Mr. Joshua Williams's views, however, do not rest on his own personal opinion: they are identical with those of Mr. Fearne, Mr. Brodie, Mr. Duval, Mr. Preston, Mr. Butler,

(*m*) The question is discussed in an article by C. Sweet in XLIX Sol. Jo. 793. In the addenda to the second edition of his work on Perpetuities, Mr. Gray refers to this article without dissent.

(*n*) [1905] 1 Ch. at p. 546.

(*o*) Mr. Gray remarks (§ 284) that "as the Rule [meaning the modern Rule against Perpetuities] governs all contingent equitable limitations of real estate and all contingent limitations, legal and equitable, of personal estate, whether in the form of remainders or not, it is very desirable that legal contingent remainders of real estate should be subjected to the Rule also." On this it may be noted, first, that subjecting legal contingent remainders to the Rule would not make the law symmetrical, because they are already subject to their own special rules, which do not apply to other contingent interests; and secondly, that the desire of text writers to make the law symmetrical does not justify the Courts in applying the modern Rule to common law interests which were recognised as valid long before the Rule was invented.

Lord St. Leonards, and the other distinguished real property lawyers above referred to, while the views of Mr. Gray (which are identical with those of Mr. Lewis) make the rule in *Whitby* v. *Mitchell* and the doctrine of *cy-près* hopelessly unintelligible (*p*).

Common law conditions, etc.

(4) *Other Common Law Interests.*—Questions seldom arise under wills as to common law interests in land other than contingent remainders, but it may be useful to state shortly how the law at present stands. In 1832 the Real Property Commissioners remarked, "The ancient common law did not restrain the creation of future interests to a given period. The time allowed for re-entries under conditions broken, and for grants of rentcharges, or other incorporeal hereditaments, commencing *in futuro*, and for creating the *interesse termini*, was indefinite, however Courts of Justice may at present be disposed to consider them within that policy of the law which restrains perpetuities. Sir Edward Coke expressly says, 'If I enfeoff another of an acre of ground, upon condition that if mine heir shall pay the feoffee, &c., twenty shillings, he and his heirs shall enter, this condition is good.' We know of no bounds originally fixed by the common law within which interests of this kind were restrained; and it is a mistake to suppose that at the common law, properly so called, there was any rule against perpetuities" (*q*). The Commissioners accordingly recommended that the operation of the Rule against Perpetuities should be extended so as to apply to future interests of the kind above referred to, with certain exceptions in the case of landlord and tenant. No statute was passed to carry out this recommendation (*qq*). Mr. Charles Butler also treated common law conditions as being free from restriction on the score of perpetuity (*r*). The opinion of modern text-book writers is divided. Mr. Lewis (*s*) and Mr. Gray (*t*) think that the opinion of the Real Property Commissioners is erroneous, and that conditions of re-entry are within the Rule against Perpetuities. Mr Gray quotes a *dictum* of Jessel, M.R., in *Re Macleay* (*u*), and another of North, J., in *Dunn* v. *Flood* (*x*), as supporting

(*p*) See the argument in *Williams* v. *Teale*, 6 Ha. at p. 245.

(*q*) Third Report, 29. The names of the distinguished lawyers who formed the Commission are given above, p. 344, n. (*n*). The erroneous opinion that the modern Rule against Perpetuities formed part of the common law is, however, widely held; it was held by Jessel, M.R., in *L. & S. W. Railway* v. *Gomm*, 20 Ch. D. 562, and by the Privy Council in *Cooper* v. *Stuart*, 14 A. C. 286.

(*qq*) See now the Law of Property Act, 1925, s. 4, *post*, p. 351.

(*r*) Co. Litt. 327a, n (2), II, 3.

(*s*) Perp. 616.

(*t*) Perp. § 300a *seq.*

(*u*) L. R., 20 Eq. 186.

(*x*) 25 Ch. D. 629. See also the *dictum* of Baggallay, L.J., on appeal: 28 Ch. D. 592.

his view. Mr. Challis, on the other hand, was unable to understand why a rule invented by the Judges in the seventeenth century to restrict the creation of future interests unknown to the common law, should be applied to future interests which the common law always allowed to be created without any restriction (*y*). The point first arose for decision in *Re The Trustees of Hollis's Hospital and Hague's Contract* (*z*). In that case the question was as to the title to some property which had been conveyed by Thomas Hollis in 1726 to trustees upon trust for a hospital. The conveyance contained a proviso that if at any time thereafter the property should be used for any purposes other than those therein mentioned, it should revert to the heirs of Thomas Hollis. Byrne, J., said : "I am of opinion that the condition in question is obnoxious to the Rule against Perpetuities." The point, however, was raised on a summons under the Vendor and Purchaser Act, and as the heir-at-law of Thomas Hollis declined to be bound by the decision, Byrne, J., refused to force the title on the purchaser. It will be noticed that the learned Judge relied to a considerable extent on the opinion of Mr. W. D. Lewis, and that the opinion of the Real Property Commissioners (most of whom were far superior to Mr. Lewis in learning and authority) was not cited. This was followed by Eve, J., in *Re Da Costa* (*a*).

Law of Property Act, 1925, s. 163.

(N) THE NEW LAW.—The new legislation, in addition to abolishing the rule in *Whitby* v. *Mitchell* has made certain alterations and has removed certain doubts in the law relating to perpetuities. To obviate cases of hardship which sometimes occurred because the vesting was postponed till after the age of twenty-one, section 163, sub-section 1 of the Law of Property Act, 1925, enacts that (as regards wills coming into operation after 1925) where the absolute vesting either of capital or income of property, or the ascertainment of a beneficiary or class of beneficiaries is made to depend on the attainment by the beneficiary or members of the class of an age exceeding twenty-one years, and thereby the gift to that beneficiary or class or any member thereof, or any gift over, remainder, executory limita-

(*y*) Challis, R. P. 174.

(*z*) [1899] 2 Ch. 540. See *Att.-Gen.* v. *Cummins*, [1906] Ir. R. 406, especially the excellent judgment of Pallas, C.B. An undoubted exception to the modern Rule against Perpetuities occurs in the case of covenants for the perpetual renewal of leases (*London & South-Western Ry.* v. *Gomm*, 20 Ch. D. 562), and it seems somewhat curious that common law conditions, which are of much greater antiquity, should not be allowed a similar immunity : see Williams, Vendor and Purchaser (3rd ed.), p. 637, n. (*m*).

(*a*) [1912] 1 Ch. 337. See also *Re Peel's Release*, [1921] 2 Ch. 218 (clause of revocation).

tion or trust arising on the total or partial failure of the original gift is, or but for this section would be, rendered void for remoteness, the will shall take effect for the purposes of such gift, gift over, remainder, executory limitation, or trust as if the absolute vesting or ascertainment aforesaid had been made to depend on the beneficiary or member of the class attaining the age of twenty-one years, and that age shall be substituted for the age stated in the will. Thus if a gift would be void because vesting is postponed to the age of twenty-five years the will is read as if twenty-one years were substituted for twenty-five years.

Reversionary leases.

Before 1926 a reversionary lease could be granted to commence at a date beyond the period fixed by the rule (*b*); but this is not possible since 1925 because section 149, sub-section 3 of the Law of Property Act, 1925, enacts that a term at a rent, or granted in consideration of a fine, limited after 1925 to take effect more than twenty-one years from the date of the instrument purporting to create it, shall be void.

Law of Property Act, 1925, s. 4, sub-s. 3.

Section 4, sub-section 3 of the Law of Property Act, 1925, now provides that all rights of entry affecting a legal estate which are exercisable on condition broken or for any other reason may, after 1925, be made exercisable by any person and the persons deriving title under him, but in regard to an estate in fee simple (not being a rentcharge held for a legal estate) only within the period authorised by the rules relating to perpetuities. Under section 2 (e) the only rights of entry capable of subsisting at law are rights of entry exercisable over or in respect of a legal term of years absolute or annexed for any purpose to a legal rentcharge.

Powers of distress and certain rights.

Section 162 of the Law of Property Act, 1925, provides that the rule does not apply to powers of distress, etc., by way of indemnity, rentcharges by way of indemnity, rights for working minerals, cutting trees, executing repairs, constructing drains, etc. Nor does the rule apply to any powers or remedies conferred by section 121 of the Act (replacing section 44 of the Conveyancing Act, 1881) or to similar powers.

Accumulation to pay off National Debt.

It may also here be mentioned that under section 9 of the Superannuation and other Trust Funds (Validation) Act, 1927, funds may be accumulated for a period in excess of that allowed by the rule against remoteness to be applied at the end of that period in reduction of the National Debt.

(*b*) *Mann, Crossman & Paulin, Ltd.* v. *Land Registry*, [1918] 1 Ch. 203.

CHAPTER XI.

ACCUMULATION OF INCOME.

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Old rule fixing extent of prospective accumulation of income.

I.—The Accumulations Act, 1800.—Mr. Jarman says (*a*): "Formerly the rule that fixed the period for which the vesting of property might be suspended, regulated also the power of deferring its enjoyment; it being then permitted to a settlor or testator to create an accumulating trust absorbing the entire income during the full period for which the vesting might be protracted, and whether it was or was not so protracted (*b*). And no inconvenience appears to have been felt in allowing so wide a range of accumulation, few persons having availed themselves of the permission to a mischievous extent, until Mr. Thellusson made the extraordinary and well-known disposition of his immense property (*c*), by the operation of which, every child and more remote descendant born or rather procreated in his lifetime . . . were excluded from enjoyment, for the purpose of swelling to a princely magnitude, the fortune of some remote and unascertained scions of the stock. The necessity then became apparent, of preventing, by legislative enactment, the repetition of a scheme of disposition fraught with so much mischief and hardship. This led to the statute 39 & 40 Geo. 3, c. 98 (*d*), which, after reciting that it was expedient that all dispositions of real or personal estate, whereby the profits and produce thereof were directed to be accumulated, and the beneficial enjoyment thereof was postponed, should be made subject to the restrictions thereinafter contained, proceeded to

The Thellusson Act.

(*a*) First edition, p. 264.

(*b*) As to the invalidity of trusts for accumulation on the ground of remoteness, see *ante*, p. 280. And as to the cases where a trust for accumulation is nugatory, because the beneficiary can put a stop to it, see *Saunders* v. *Vautier*, 4 Bea. 115, and other cases cited *post*, p. 860.

(*c*) 4 Ves. 227.

(*d*) Known as the Thellusson Act, until the Short Titles Act, 1896, gave it an official title. It is repealed and re-enacted with slight modifications by section 164 of the Law of Property Act, 1925.

enact 'that no person or persons shall, after the passing of this act, by any deed or deeds, surrender or surrenders, will, codicil or otherwise soever, settle or dispose of any real or personal property, so and in such manner, that the rents, issues, profits or produce thereof shall be wholly or partially accumulated, for any longer term than *the life or lives of any such grantor or grantors, settlor or settlors, or the term of twenty-one years from the death of any such grantor, settlor, devisor or testator, or during the minority or respective minorities of any person or persons who shall be living or en ventre sa mère at the time of the death of such grantor, devisor, or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations would for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends, or annual produce so directed to be accumulated;* and in every case, where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated, contrary to the provisions of this act, go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed.' Sect. [2] provides, 'That nothing in this act contained shall extend to any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settlor, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood, upon any lands or tenements, but that all such provisions and directions shall and may be made and given as if this act had not passed.' By sect. [3] (*e*) the act is not to extend to heritable property in Scotland (*f*), nor [by sect. 4] to wills made before the act, unless the testator should be living and of sound mind for twelve calendar months from its passing."

Accumulation restrained, unless for life of settlor, or for twenty-one years, or during minority, etc.

Act not to extend to provisions for debts, or portions for children;

—nor to Scotland; nor to prior wills, unless, etc.

This statute, having been passed just before the Irish Act of Union came into operation, does not extend to Ireland (*g*).

—nor to Ireland.

(*e*) Since repealed by stat. 11 & 12 Vict. c. 36, s. 41.

(*f*) But a direction to invest accumulations in lands in Scotland did not bring the case within section 3: *Macpherson* v. *Stewart*, 28 L. J. Ch. 177.

(*g*) *Ellis* v. *Maxwell*, 12 Bea. 104; *Heywood* v. *Heywood*, 29 Bea. 9. English leaseholds, though personal estate, are governed by the *lex loci*, and though belonging to a domiciled Irishman are subject to the Act: *Freke* v. *Lord Carbery*, L. R. 16 Eq. 461; *vide ante*, p. 2.

CHAPTER XI.

What constitutes a direction to accumulate.

To bring a case within the Act, it is not necessary that the word "accumulate" should be used, or that there should be an express direction to accumulate (*h*); a direction to "invest" or "capitalise" income (*i*), or to form a reserve or guarantee fund, or the like, may be sufficient (*k*). Indeed, the Act applies in cases where an obligation to accumulate arises from the nature of the gift, for in applying the statutory provision against accumulation, as Mr. Jarman remarks (*l*), "regard is had to the substance and effect, and not to the form and mere language of an instrument; for, if property be disposed of in such manner as to produce an accumulation of income, for a period exceeding what the statute authorises, it will not avail that there is an absence of any trust expressly and in terms directed to this object." Thus if a testator charges the income of his property with the raising of a gross sum which cannot be raised within the period allowed by the Act, this is tantamount to a trust for accumulation, and is void so far as it exceeds the period (*m*).

Trusts whose effect is to produce accumulation held to be within the statute.

As to accumulation under a residuary bequest in favour of unborn persons at majority.

An obvious case of this nature is that of a bequest of a general residue to a class of persons (some of them unborn at the testator's decease), whose shares are not to vest until the age of twenty-one years; for it is to be observed that, as a residuary bequest, to take effect in future, carries not only the bulk or *corpus* of the property, but also the intermediate income (*n*), it follows that the statute is infringed whenever the vesting, or even the distribution, is postponed until a period or event which occurs more than twenty-one years after the testator's decease, without any express application of the income accruing in the interval. In such a case the income is accumulated for the statutory period, and after that goes as under an intestacy (*o*). Sir L. Shadwell was indeed of opinion that the statute did not affect accumulation which arose from the nature of the gift, but operated merely to strike out of the will so much of a direction to accumulate as exceeded the prescribed limits (*p*); his opinion, however, is clearly opposed to the other authori-

(*h*) *Morgan* v. *Morgan*, 4 De G. & S. 164. The direction may be implied: *Watson's Trustees* v. *Brown*, [1923] S. C. 228, distinguishing *Mitchell's Trustees* v. *Fraser*, [1915] S. C. 350.

(*i*) *Mathews* v. *Keble*, L. R. 3 Ch. 691; *Re Danson*, 13 R. 633; *Re Mason*, [1891] 3 Ch. 467.

(*k*) *Re Cox*, [1900] W. N. 89. As to savings out of income, see *Re Lindsay's Trustees*, [1911] S. C. 584.

(*l*) First edition, p. 274.

(*m*) *Shaw* v. *Rhodes*, 1 My. & Cr. 135; *S. C. sub nom. Evans* v. *Hellier*, 5 Cl. & F. 114.

(*n*) As to this, see *post*, pp. 1006, 1007.

(*o*) *Re Taylor*, [1901] 2 Ch. 134. For another example of accumulation required by law, see *Re Hiscoe*, 48 L. T. 510.

(*p*) *Elborne* v. *Goode*, 14 Sim. 165; *Corporation of Bridgnorth* v. *Collins*, 15 *ib*. 538.

ties upon this question, including one of the highest Court of Appeal (*q*). There is a plain distinction between such a case and the cases where, the property being vested in an infant, the accumulation is to be assumed to be the act of the Court (*r*).

Where trust is postponed.

The Act also does not apply where property is directed to be dealt with in a manner which cannot immediately be carried into effect, and it consequently becomes necessary to accumulate the income (*s*). Thus, in *Wentworth* v. *Wentworth* (*t*), a testator devised his residue upon trust for conversion, with power to postpone conversion for twenty-one years, and a direction that during that period the surplus income and all accumulations thereof should go in augmentation of capital; the residue was settled on trusts for tenants for life and remainderman, and included minerals which were not let or worked until after the testator's death : it was held that during the twenty-one years the trustees were bound to accumulate the rents and royalties, and that after that period the tenants for life were entitled to receive out of the rents and royalties a fair equivalent for the annual income which would have been received by them if the property had been sold at the expiration of the twenty-one years, the residue being added to capital.

Trusts for improving or maintaining a property.

Nor is a trust for the application of money in keeping buildings in repair within the Act. But a trust for the erection of new buildings is within the Act. The test seems to be whether the expenditure ought properly to be debited to capital or income (*u*).

Codicil.

In *Re Cresswell* (*x*) it was held that a codicil should not be read into a will so as to extend the period of accumulation and make it void.

Trusts embracing too wide an accumulation good *pro tanto*.

"It is well settled," says Mr. Jarman (*y*), "that a trust for accumulation exceeding the statutory limit, is good *pro tanto*. Thus, where a testator directed that the profits of certain canal shares should be invested, the interest arising to be applied to the education of the children of A, and B (who had no child at the death of the testator), and on their attaining twenty-one

(*q*) *Evans* v. *Hellier*, 5 Cl. & Fin. 114; *S. C. nom. Shaw* v. *Rhodes*, 1 My. & Cr. 135; *M'Donald* v. *Bryce*, 2 Kee. 276; *Morgan* v. *Morgan*, 20 L. J. Ch. 111; 15 Jur. 319; *Tench* v. *Cheese*, 6 D. M. & G. 453; *Macpherson* v. *Stewart*, 28 L. J. Ch. 177; and see *Bective* v. *Hodgson*, 10 H. L. C. 664, 668; *Wade Gery* v. *Handley*, 3 Ch. D. 374.

(*r*) See *per* Wood, L.J., *Mathews* v. *Keble*, L. R. 3 Ch. 696; *per* Lord Cranworth, V.-C., *Wilson* v. *Wilson*, 1 Sim. (N.S.) 297.

(*s*) *Lombe* v. *Stoughton*, 12 Sim. 304.

(*t*) [1900] A. C. 163. See this and other cases cited *post*, p. 1199.

(*u*) See *Vine* v. *Raleigh*, [1891] 2 Ch. 13; *Drake* v. *Trefusis*, L. R. 10 Ch. 364; *Re Mason*, [1891] 3 Ch. 467, cited *post*, p. 371.

(*x*) 58 Sol. J. 360.

(*y*) First edition, p. 269.

to be divided among them; Sir W. Grant, M.R., held that the accumulation was good for twenty-one years from the death of the testator, though void for the subsequent period" (*z*). So a trust to accumulate the income of property in order to raise a specified sum for the benefit of persons *in esse*, is stopped by the statute at the expiration of twenty-one years from the testator's death (*a*). If, however, the persons to benefit by any trust or accumulation are not necessarily ascertainable within the period allowed by the Rule against Perpetuities, the trust is void *ab initio* (*b*).

The results which follow from a trust for accumulation being invalidated, wholly or partially, by the statute, are referred to in a later part of this chapter (*c*).

How the period of twenty-one years is to be calculated.

The period of twenty-one years from the testator's death is to be calculated exclusively of the day of his death (*d*), and must be a period immediately following his death. Thus, if the accumulation be fixed to commence at a time subsequent to the testator's death, it will necessarily cease when twenty-one years from his death have elapsed, though it may have been in operation only one or two years (*e*).

Trusts void or inoperative irrespectively of Act.

It should be borne in mind that a trust for accumulation may be void *ab initio*, or become inoperative before the expiration of the period prescribed by the testator, for reasons irrespective of the Act. Thus a trust for accumulation which transgresses the limits allowed by the Rule against Perpetuities is void *ab initio* (*f*), and a trust to accumulate the income of property to which a person is absolutely entitled may be stopped by him at any time (*g*).

A testator or settlor is not at liberty to take more than one of the several periods of accumulation mentioned in the statute (for instance, he cannot direct an accumulation for a term of twenty-one years, and also during the minority of a person

(*z*) *Longdon* v. *Simson*, 12 Ves. 295; see also *Griffiths* v. *Vere*, 9 Ves. 127; *Palmer* v. *Holford*, 4 Russ. 403; *Re Rosslyn's Trust*, 16 Sim. 391, and cases in this section, *passim*; *Talbot* v. *Jevers*, L. R. 20 Eq. 255, where the accumulation was limited to such period "as the rules of law will permit."

(*a*) *Oddie* v. *Brown*, 4 De G. & J. 179; *Williams* v. *Lewis*, 6 H. L. C. 1013; *ante*, p. 343.

(*b*) *Curtis* v. *Lukin*, 5 Bea. 147; *Scarisbrick* v. *Skelmersdale*, 17 Sim. 187; *ante*, p. 280.

(*c*) *Post*, p. 364.

(*d*) *Gorst* v. *Lowndes*, 11 Sim. 434; *Lester* v. *Garland*, 15 Ves. 248.

(*e*) *Shaw* v. *Rhodes*, 1 My. & Cr. 154; *Webb* v. *Webb*, 2 Bea. 493; *Att.-Gen.* v. *Poulden*, 3 Hare, 555; *Nettleton* v. *Stephenson*, 3 De G. & S. 366.

(*f*) *Ante*, pp. 280, 343. *Curtis* v. *Lukin*, 5 Bea. 147; *Scarisbrick* v. *Skelmersdale*, 17 Sim. 187.

(*g*) Ante, p. 343; *Wharton* v. *Masterman*, [1895] A. C. 186; *Re Trevanion*, [1910] 2 Ch. 539; and see *Phipps* v. *Kelynge*, 2 V. & B. 57, n., as explained in *Southampton* v. *Hertford*, *ib.* 54; *Re Knapp*, [1929] 1 Ch. 364.

entitled under the limitations) : the language of the statute being disjunctive (*h*).

In applying the Act the Court will not presume that a woman is past child bearing (*i*).

II.—Accumulation during Minority.—The fourth period extends to the minorities of persons born after the testator's death and also to successive minorities (*k*).

The following qualification has been added to the previous law by section 165 of the Law of Property Act, 1925.

S. 165 of the Law of Property Act, 1925.

Where the accumulations of surplus income are made during a minority under any statutory power or under the general law, the period for which such accumulations are made is not (whether the trust was created or the accumulations made before or after the commencement of this Act) to be taken into account in determining the periods for which accumulations are permitted to be made by the last preceding sections, and accordingly an express trust for accumulation for any other permitted period shall not be deemed to have been invalidated or become invalid by reason of accumulations also having been made as aforesaid during such minority (*l*).

Re Maber.

Thus, in *Re Maber* (*m*), a testator gave his residue in trust for a bachelor's children who should attain twenty-one. The income was accumulated for twenty-one years, but during this period the bachelor married and died, leaving three children, one of whom subsequently died. The eldest child attained twenty-one. It was held that the effect of section 165 was that the years of minority accumulation which commenced during the twenty-one years' period were not to be reckoned in ascertaining the period and that the income of the younger child's contingent moiety must in the first place be applied for her maintenance and the balance could be validly accumulated under section 43 of the Conveyancing Act, 1881.

The Act does not impliedly make valid trusts for accumulation previously bad.

III.—Accumulation for Payment of Debts.—A trust for accumulation which not only exceeds the statutory limits, but also the period allowed by the Rule against Perpetuities, is, like

(*h*) *Wilson* v. *Wilson*, 1 Sim. (N.S.) 288; *Rosslyn's Trust*, 16 Sim. 391; *Ellis* v. *Maxwell*, 3 Bea. 595; *Jagger* v. *Jagger*, 25 Ch. D. 729; *Re Errington*, 76 L. T. 616.

(*i*) *Re Deloitte*, [1926] 1 Ch. 56.

(*k*) *Re Cattell*, [1914] 1 Ch. 177, not following the *dicta* in *Haley* v. *Bannister*, 4 Madd. 275; *Ellis* v. *Maxwell*, 3 Bea. 597; *Bryan* v. *Collins*, 16 Bea. and *Jagger* v. *Jagger*, 25 Ch. D. 729.

(*l*) *Griffiths* v. *Vere*, 9 Ves. 127, 136; *Tench* v. *Cheese*, 6 De G. M. & G. 453, 463; *Mathews* v. *Keble*, L. R. 3 Ch. 691, 696, and *Lambe* v. *Stoughton*, 12 Sim. 304.

(*m*) [1928] 1 Ch. 88.

Accumulation for payment of testator's debts valid, though to endure longer than a life and twenty-one years; but if for payment of the debts of another, good only if within that limit; —rule not affected by the Act.

any other such limitation, void *in toto*, even though it be for a purpose excepted from the operation of the Act; for the Act does not by the exceptions contained in it impliedly make valid what was previously invalid (*n*). As before noticed (*o*), accumulation for payment of the debts of the testator does not contravene the Rule against Perpetuities, and is therefore good, though its duration be unlimited (*p*). But an accumulation for the payment of debts of a stranger does not come within the reason of the rule which protects a similar provision for payment of the testator's own debts, and is therefore valid by the common law only for the period of a life in being and twenty-one years after. The Act leaves this rule untouched, section 2 excepting from the operation of the first section "all provisions for payment of debts of any grantor, settlor, or devisor, or other person or persons" (*q*). And this has been held to include not only debts due at the testator's death, but future debts accruing within the period last mentioned (*r*). But the accumulation must be designed and intended *bona fide* as a provision for payment of debts. Where a testator directed the income of residue or a sufficient part of it to be applied for the benefit of his son, and the surplus to be accumulated and added to capital, and after the son's death the whole to be divided among the son's children; but if the son should die without issue, the testator bequeathed a moiety of the fund to B; B afterwards became indebted to the testator, who then by codicil declared that B should not be obliged to pay the debt unless and until he became possessed of the moiety, which, in that case, was to be set off against the debt. B eventually became entitled to the moiety, but it was held that the testator was not thinking of the debt when he directed the accumulation, and that it was not protected by section 1 (*s*). And if creditors avail themselves of their legal rights, and get their debts paid in a different way, as by resorting to the *corpus*, the accumulation cannot, even if the will so direct, be continued beyond the period allowed by section 1 of the Act, in order to recoup the persons to whom,

(*n*) *Lord Southampton* v. *Marquis of Hertford*, 2 V. & B. 54; *Marshall* v. *Holloway*, 2 Sw. 432; *Browne* v. *Stoughton*, 14 Sim. 369 (as to these cases see *ante*, pp. 285, 286); *Scarisbrick* v. *Skelmersdale*, 17 Sim. 187; *Boughton* v. *James*, 1 Coll. 26, 1 H. L. C. 406; *Turvin* v. *Newcome*, 3 K. & J. 16.

(*o*) *Ante*, p. 342.

(*p*) *Lord Southampton* v. *Marquis of Hertford*, 2 V. & B. at p. 65; *Bacon* v. *Proctor*, T. & R. 40; *Bateman* v. *Hotchkin*, 10 Bea. 426. As to what are "incumbrances" within a trust for accumulation for their discharge, see *Re Llanover*, [1907] 1 Ch. 635.

(*q*) *Barrington* v. *Liddell*, 2 D. M. & G. 498.

(*r*) *Varlo* v. *Faden*, 27 Bea. 255; 1 D. F. & J. 211; *Re Hurlbatt*, [1910] 2 Ch. 553 (reserve fund to meet liabilities under leases). See *Re Mason*, [1891] 3 Ch. 467.

(*s*) *Mathews* v. *Keble*, L. R. 3 Ch. 691.

subject to the trust for accumulation, the estate is devised (*t*). Even if the statutory period has not expired, the remainderman has no equity (unless the will contains a direction to that effect) to have the accumulation continued during the statutory period in order to recoup the capital (*u*). But an annuitant may have the right of subrogation or marshalling as against creditors (*x*).

Construction of the exception as to accumulation for children's portions.

IV.—Accumulation for Portions (*y*).—The exception in the Act respecting accumulations for the purpose "of raising portions for any child or children (*z*) of any grantor, settlor or devisor, or any child or children of any person taking any interest under such conveyance, settlement or devise," has created great difficulty. And first, what is a portion within this exception?

Barrington v. *Liddell.*

In *Beech* v. *Lord St. Vincent* (*a*), lands were devised to A for life, with remainder to his first and other sons in tail, with remainders over, and £2,000 per annum was directed to be accumulated for twenty-one years during the life of A, and so much longer as A had any younger children; the accumulations to be held on certain trusts for such younger children. It was twice held that this was an accumulation for raising portions within the exception in the statute. And in *Barrington* v. *Liddell* (*b*), where lands had been settled on the marriage of A in the usual way, with a term of years for securing (in the events that happened) the sum of £40,000 for younger children's portions; and afterwards a testator bequeathed a sum of £15,000 in trust to be accumulated during the life of A, until it reached the sum of £40,000, and then to be applied in satisfaction of the portions; and he gave another sum for building a mansion house on the settled estate; Lord St. Leonards held, that this was clearly within the exception, and that the accumulation might continue after the expiration of twenty-one years, computed from the testator's death. A provision for raising or satisfying portions charged or created by a previous instrument is, therefore, within the exception in the statute (*c*).

(*t*) *Tewart* v. *Lawson*, L. R. 18 Eq. 490; *Re Heathcote*, [1904] 1 Ch. 826.
(*u*) *Ibid.*; *Norton* v. *Johnstone*, 30 Ch. D. 649; *Re Green*, 40 Ch. D. 610.
(*x*) *Biggar* v. *Eastwood*, 19 L. R. Ir. 49.
(*y*) This section, with the exception of the passages in brackets, which have been added, is taken verbatim from the fourth edition of this work, by Mr. Vincent.
(*z*) This means legitimate children: *Shaw* v. *Rhodes*, 1 M. & Cr. 159. See now the Legitimacy Act, 1926.
(*a*) 3 De G. & S. 678.
(*b*) 2 D. M. & G. 480.
(*c*) But (as appears by *Beech* v. *Lord St. Vincent* and other cases, and notwithstanding *Halford* v. *Stains*, 16 Sim. 496) not exclusively so.

CHAPTER XI.

Not necessary to exclude son.

[In *Re Stephens* (*d*), the testator directed income to be accumulated for the benefit of all the children of his daughter who attained twenty-one or married; and it was held by Buckley, J., that the fact of the eldest son not being excluded (as in *Beech* v. *Lord St. Vincent*) did not prevent the fund from being a "portion."]

Gift of general estate augmented by accumulation is not a portion.

On the other hand, it has been decided that an accumulation of the whole of a testator's estate (*e*), or of the residue, comprising the bulk, of it (*f*), and a gift of the augmented fund, comprising both capital and accumulations, is not protected by the exception. "A direction to accumulate all a person's property," said Lord Cranworth (*g*), "to be handed over to some child or children when they attain twenty-one can never be said to be a direction for raising portions for the child or children; it is not raising a portion at all; it is giving everything. 'Portion' ordinarily means a part or share, and though I do not know that a gift of the whole might not in some circumstances come under the term of a gift of a portion, yet I do not think it comes within the meaning of a portion in this clause of the Act, which points to the raising of something out of something else for the benefit of some children or class of children. . . . If every direction for accumulation for a child was a portion, the intention of the legislature, which was to prevent accumulations, such accumulations being most frequently directed for the benefit of children, would be entirely defeated."

Burt v. *Sturt.*

Again, in *Burt* v. *Sturt* (*h*), where legacies were given to all the testator's children, and the residue was directed to be accumulated during the lives of the children and of the survivor of them, and after the decease of the survivor the whole was to be divided between the grandchildren of the testator then living, Sir W. P. Wood, V.-C., said it was simply a scheme of the testator for the purpose of accumulating his property into one mass, and handing it over in that mass at the remote period of the death of the survivor of a number of persons whom he had mentioned, not to any given child or children, but to two or three or possibly one favoured individual; it did not seem to him that in any sense or upon any rational construction he could

(*d*) [1904] 1 Ch. 322.

(*e*) *Wildes* v. *Davies*, 1 Sm. & Gif. 475.

(*f*) *Eyre* v. *Marsden*, 2 Kee. 573; *Bourne* v. *Buckton*, 2 Sim. (N.S.) 91; *Edwards* v. *Tuck*, 3 D. M. & G. 40; *Mathews* v. *Keble*, L. R. 3 Ch. 691. [*Re Walker*, 54 L. T. 792, where the residuary personalty and the accumulations of the income thereof, and the accumulated rents of certain real and leasehold properties, were given as one fund, and it was held that the accumulations of the rents could not be separated so as to constitute a portion.]

(*g*) *Edwards* v. *Tuck*, 3 D. M. & G. 58.

(*h*) 10 Hare, 415. See also *Drewett* v. *Pollard*, 27 Bea. 196. [*Mackay's Trustees* v. *Mackay*, [1909] S. C. 139.]

call that the raising of a portion for children : in truth it was only the Thellusson scheme arranged in a somewhat less complicated and less extensive shape.

Whether same rule applies to pecuniary legacy so augmented. *Jones* v. *Maggs.*

In *Jones* v. *Maggs* (*i*), where a legacy of £200 was directed to be accumulated until the child of A (who then had one child) should attain twenty-one, and on that event to be divided, with its accumulations, among the children of A who should be then living, and the residue of the personal estate was given to the parent, Sir G. Turner, V.-C., held that the legacy was not a portion, though in a certain sense it was raisable out of the property of the parent; otherwise every legacy given to a child of a residuary legatee must be so construed and the Act would be wholly defeated. This decision was much influenced by the V.-C.'s opinion, now exploded, that to bring the case within the exception, the parent must take an interest in the very fund directed to be accumulated; and no distinction was noticed between the accumulation of the entirety or bulk of an estate and of a mere pecuniary legacy. The effect upon the Act of a contrary decision was certainly overstated.

Middleton v. *Losh.*

On the other hand, Sir J. Stuart, V.-C., distinguished between a gift of the whole of a testator's estate, augumented by accumulation, and a gift of a pecuniary legacy so augumented (*k*). And in *Middleton* v. *Losh* (*l*), where a testatrix bequeathed £50,000 to trustees upon trust to invest, and apply a competent part of the income towards the maintenance and support of her son W., and to accumulate the remainder, and after his decease upon trust to divide the capital and accumulations between the children of W., and in case of the death of W. without issue the capital and accumulations to sink into the residue of her personal estate; he decided that the accumulation was valid as a provision for portions, relying mainly on "the just principles of construction" adopted by Lord St. Leonards in *Barrington* v. *Liddell.*

The question chiefly discussed in that case was not what is a portion, but what interest must be given to the parent (*m*). And although the subject of gift was, as in *Middleton* v. *Losh*, a pecuniary legacy augumented by accumulation, and although it must be admitted that whether the testator has or has not directed the legacy to be taken in satisfaction of portions already charged on the estate of another person, the result *quoad* the testator's own estate is the same, yet the presence of such

(*i*) 9 Hare, 605.
(*k*) *Wildes* v. *Davies*, 1 Sm. & Gif. 475.
(*l*) 1 Sm. & Gif. 61. See also *St. Paul* v. *Heath*, 13 L. T. (N.S.) 270; and the observations on *Middleton* v. *Losh*, in 10 Hare, 426.
(*m*) See this insisted on, 2 Dr. & Sm. 61.

a direction brings the case literally within the words of the Act, and distinguishes it too widely from *Middleton* v. *Losh* to permit its being regarded as an authority for the decision in the latter case. A similar direction would equally bring within the letter of the Act a case where (as in *Edwards* v. *Tuck*) the subject of gift was not a pecuniary legacy only but the bulk of the testator's estate. But there is no actual decision to that effect.

[*Middleton* v. *Losh* was considered, and not followed, by Sargant, J., in *Re Elliott*, [1918] 2 Ch. 150.]

Legacy to accumulate in trust for one for life, and afterwards for his children, not a portion.

A trust to accumulate a legacy during a stated period, and at the expiration of it to pay the income to A for life, and afterwards to divide the capital among the children of A, is plainly not a provision for raising portions for children, but only a legacy in trust for a parent for life, and after his death for his children (*n*). And it cannot be material to the construction of the statute that the testator has or has not called the children's shares of an accumulated fund their "portions" (*o*).

Accumulation valid or not according to the purpose whereto *in event* it is applicable.

It will have been seen that, in *Middleton* v. *Losh*, the aggregate fund was not necessarily to go to the children of W., but if all his issue died in his lifetime it was to fall into the residue, so that it was not in all events a fund for portions. But the validity of the accumulation may well depend on the event: as in *Re Clulow's Trusts* (*p*), where a fund was directed to be accumulated, and was given to the children of the testator's son (who took an interest under the devise); but if there should be no children, to such persons as the parent should by will appoint; Sir W. P. Wood, V.-C., said that, if there had been children, this might have been upheld as a provision for their portions; but as there were and could be none, and the testamentary power of appointment was clearly no "portion" for the parent, the V.-C. held that the direction to accumulate was within section 1 of the Act, and invalid after the lapse of twenty-one years from the testator's death.

What interest the parent must take under the devise.

The next question is, what is the interest which a parent, not being the grantor, settlor, or devisor, must take under the conveyance, settlement, or devise in order to render valid an accumulation for portions for his children? (*q*). May it be an interest of any kind, or must it be an interest in the *identical* property from which the income directed to be accumulated arises? and must it be a substantial interest, or will a merely

(*n*) *Watt* v. *Wood*, 2 Dr. & Sm. 56.
(*o*) See *per* Kindersley, V.-C., *Bourne* v. *Buckton*, 2 Sim. (N.S.) 96.
(*p*) 1 J. & H. 639.
[(*q*) See *Re Stephens*, [1904] 1 Ch. 322.]

nominal interest suffice? In *Barrington* v. *Liddell* (*r*), Lord St. Leonards read the word "devise" in the Act as meaning "will," and held, that the interest need not be one in the very fund to be accumulated, and that the legacy for building a mansion house on the estate of which the parent was tenant for life, gave him a sufficient interest within the Act. And as to *quantum*, the L.C. cited, with apparent approbation, the opinion expressed by Lords Lyndhurst and Brougham (*s*), and approved by Lord Cranworth (*t*), that any interest, however minute, was sufficient. But according to Lord Langdale (*u*), it would seem that, where accumulation is directed for the benefit of children of several parents, if any one parent takes no interest, the whole direction fails.

Accumulations Act, 1892.

Section 166 of the Law of Property Act, 1925.

V.—Accumulation for Purchase of Land.—By the Accumulations Act, 1892 (now replaced by section 166 of the Law of Property Act, 1925), it is enacted that after June 28, 1892, no person shall settle or dispose of any property in such manner that the rents, issues, profits, or income thereof shall be wholly or partially accumulated for the purchase of land only for any longer period than during the minority or respective minorities of any person or persons who, under the uses or trusts of the instrument directing such accumulation, would for the time being, if of full age, be entitled to receive the rents, issues, profits, or income so directed to be accumulated.

The Act applies to the will of a testator who dies after the passing of the Act, although the will was executed before that date (*y*).

"Land" in this Act has the meaning given to it by the Interpretation Act, 1889, and therefore includes incorporeal hereditaments (*z*).

Limited application of Act.

It seems that the Act does not apply if the trust for accumulation authorises the application of the money in two or more ways, although one of them is the purchase of land; otherwise no effect would be given to the word "only." Thus in *Re Danson* (*a*), a testator devised freehold lands in strict settlement,

(*r*) 2 D. M. & G. 480, stated above. *Morgan* v. *Morgan*, 15 Jur. 319; 20 L. J. Ch. 109, appears to decide that a specific legacy to the parent will not render valid an accumulation of a general legacy to the child. But the case is obscure.

(*s*) *Evans* v. *Hellier*, 5 Cl. & Fin. 126.

(*t*) *Edwards* v. *Tuck*, 3 D. M. & G. 40. Wood, V.-C., appears to have been of the same opinion: *Burt* v. *Sturt*, 10 Hare, 423.

(*u*) *Eyre* v. *Marsden*, 2 Kee. 573.

(*y*) *Re Llanover*, [1903] 2 Ch. 330.

(*z*) *Re Clutterbuck*, [1901] 2 Ch. 285, correcting an error in the report of *Re Danson*, 13 R. 633.

(*a*) 13 R. 633. See *Re Beauchamp's Will Trusts*, [1914] 1 Ch. 676 (the codicil).

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and directed that accumulations made during the minority of any infant taking by purchase should be deemed capital moneys arising under the Settled Land Acts, and should be primarily liable to be laid out in the purchase of land; he also directed that during twenty-one years after his death the net profits of his leaseholds should be capitalised and become capital moneys of the settlement, and subject to the powers of the Settled Land Acts, and desired that any lands purchased therewith should be adjacent to or fitting to be held with the settled freeholds. It was held that the Act did not apply either to the accumulations of the rents of the freeholds, or to the capitalised income of the leaseholds.

Effect of Act.

Where the will directs the accumulations to be applied for two or more alternative purposes, one of which is the purchase of land, the effect of the Act is to make the will read as if the trust for the purchase of land were struck out (*b*). In *Re Knapp* (*c*) it was held that a trust to accumulate the interest on investments for twenty-one years and then to apply the interest for the purchase of land, building almshouses thereon, paying the rates and keeping the buildings in repair is not within section 166 of the Law of Property Act, 1925.

Destination of the income released from accumulation.

VI.—Destination of Released Income.—The destination of the income which the Thellusson Act releases from accumulation has occasioned much debate. The law on this point, however, may now it is conceived be stated as follows as regards wills coming into operation before 1926. (In the case of deaths after 1925 all property real and personal is distributable in the same manner in accordance with the Administration of Estates Act, 1925, so that there is no question as between the heir and the next-of-kin. This is a simplification.)

Gift in possession.

1. Where there is a present gift in possession, and the direction to accumulate is engrafted upon that gift, the statute, by discharging the property from the superadded trust, has the effect of entitling the donee or successive donees to the immediate income, as if the prior gift had stood alone (*d*).

Contingent or future interest.

2. Where the vesting of a contingent interest (*e*), or the

(*b*) *Re Llanover*, [1903] 2 Ch. 330; *Re Llanover*, [1907] 1 Ch. 635.

(*c*) [1928] W. N. 322.

(*d*) *Trickey* v. *Trickey*, 3 My. & K. 560; *Coombe* v. *Hughes*, 34 Bea. 127, 2 D. J. & S. 657. The cases in which a person is entitled to stop the accumulation of income on the ground that he is the only person interested in the property have nothing to do with the Thellusson Act (see *Wharton* v. *Masterman*, [1895] A. C. 186): they are referred to *post*, p. 860.

(*e*) *Jones* v. *Maggs*, 9 Hare, 605.

possession of a vested interest (*f*), is postponed till the expiration of the period of accumulation, the statute, by stopping the accumulation, does not accelerate the vesting in the one case, or the possession in the other (*g*), and the released income devolves as if the testator had made no disposition of it. Consequently :

(i) If the property is a legacy or a specific bequest or devise, the released income goes, in the case of personal property, to the residuary legatee (*h*); and in the case of real property, to the residuary devisee, or heir, according as the will does or does not come within the Wills Act (*i*). If it is in the nature of a charge on real estate, it sinks for the benefit of the estate (*k*). Where the residue is not given absolutely, but only for life or some other limited interest, the released income does not form part of the capital of the residue, and is distributable as income (*l*).

Income of residue.

(ii) Where it is residue that is directed to be accumulated, the income of such residue, when the accumulation is stopped, will, in obedience to a well-settled principle (*m*), devolve in the case of personal property to the next-of-kin (*n*), in the case of real property to the heir (*o*), and in the case of a mixed fund to the next-of-kin and heir respectively (*p*).

Income of accumulation.

3. The income of the accumulations follows the same rule; therefore if the accumulations arise from personal property,

(*f*) *M'Donald* v. *Bryce*, 2 Kee. 276; *Eyre* v. *Marsden*, *ib.* 574; *Ellis* v. *Maxwell*, 3 Bea. 597; *Nettleton* v. *Stephenson*, 3 De G. & S. 366; *Lord Barrington* v. *Liddell*, 10 Hare, 429; 2 D. M. & G. 480; *Weatherall* v. *Thornburgh*, 8 Ch. D. 261; *Talbot* v. *Jevers*, L. R. 20 Eq. 255.

(*g*) *Green* v. *Gascoyne*, 4 D. J. & S. 565.

(*h*) *Ellis* v. *Maxwell*, 3 Bea. 587; *Att.-Gen.* v. *Poulden*, 3 Hare, 555; *Jones* v. *Maggs*, 9 *ib.* 605; *Re Parry*, 60 L. T. 489, and the cases cited *post*, note (*l*).

(*i*) *Nettleton* v. *Stephenson*, 3 De G. & S. 366; *Smith* v. *Lomas*, 33 L. J. Ch. 578; *Green* v. *Gascoyne*, 4 D. J. & S. 565. In *Simmons* v. *Pitt*, L. R. 8 Ch. 978, a charge on real estate was directed by the owner of it to form part of his personal estate, the income of which was to be accumulated, and it was held that the released income went to his next-of-kin.

(*k*) *Shaw* v. *Rhodes*, 1 My. & C. 135; *S. C. Evans* v. *Hellier*, 5 Cl. & F. 114; *Re Clulow's Trusts*, 1 J. & H. 639.

(*l*) *Re Garside*, [1919] 1 Ch. 132; *Re Hawkins*, [1916] 2 Ch. 570, following *Re Phillips*, 49 L. J. Ch. 198, and *Re Cababé*, 59 Sol. J. 129, in preference to *Crawley* v. *Crawley*, 7 Sim. 427; *O'Neill* v. *Lucas*, 2 Keen, 313, and *Re Pope*, [1901] 1 Ch. 64. See also *Stewart's Trustees* v. *Whitelaw* (1926), Sc. L. T. 400.

(*m*) *Skrymsher* v. *Northcote*, 1 Sw. 566.

(*n*) *M'Donald* v. *Bryce*, 2 Kee. 276; *Pride* v. *Fooks*, 2 Bea. 437; *Elborne* v. *Goode*, 14 Sim. 165; *Wilson* v. *Wilson*, 1 Sim. (N.S.) 288; *Bourne* v. *Buckton*, 2 *ib.* 91; *Oddie* v. *Brown*, 4 De G. & J. 179; *Weatherall* v. *Thornburgh*, 8 Ch. D. 261 (Crown entitled in default of next-of-kin).

(*o*) *Halford* v. *Stains*, 16 Sim. 488; *Wildes* v. *Davies*, 1 Sm. & Gif. 475; *Weatherall* v. *Thornburgh*, *supra* (Crown in default of heir); *Re Perkins*, 101 L. T. 345 (land sold under a power of sale).

(*p*) *Eyre* v. *Marsden*, 2 Kee. 564; 4 My. & Cr. 431; *Edwards* v. *Tuck*, 3 D. M. & G. 40; *Burt* v. *Sturt*, 10 Hare, 415; *Ralph* v. *Carrick*, 5 Ch. D. 984; *Re Travis*, [1900] 2 Ch. 541.

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not being a residue, the income falls into the residue (*q*), so that a tenant for life would be entitled to such income; and where the residuary personalty is directed to be accumulated, the income of the accumulations goes to the next-of-kin. Where the accumulations arise from residuary real estate, the accumulations of rents and profits seem to preserve their character of realty, so that the heir is entitled to the income of such accumulations (*r*); and it would, of course, follow that, where the accumulations arose from real estate other than residuary, the residuary devisee would be entitled. In *Ellis* v. *Maxwell* (*s*), where the rents of the testator's real estate were directed to form part of his personal estate, and the personal estate was directed to be accumulated, it was held that the income of the accumulations went to the residuary legatees. The case turned on the special words of the will.

Morgan v. *Morgan.*

In *Morgan* v. *Morgan* (*t*), the testatrix bequeathed a legacy of £5,000 to A upon her marriage with all the accumulations of interest thereon from the time of the testatrix's death, and gave her residuary estate to C for life, with remainder to various persons. C died in 1838. Twenty-one years from the testatrix's death expired in 1846. A was still living, and a spinster. It was held that in the event of A marrying she would be entitled to the legacy and accumulations made down to 1846; that the income of the legacy and accumulations from 1846 until the marriage or death of A belonged to the residuary legatees; that in the event of her dying without having been married the personal representative of C would be entitled to so much of the accumulations as represented that part of the income of A's legacy which accrued during C's lifetime; that so much of the interest on the accumulations made between 1825 (the death of the testatrix) and 1838 as accrued between 1846 and the death or marriage of A, belonged in any event to C's personal representative; and that so much of the interest on the accumulations made between 1838 and 1846 as accrued between 1846 and the death or marriage of A, belonged in any event to the residuary legatees.

Bryan v. *Collins.*

Another case of a contingent legacy arose in *Bryan* v.

(*q*) See cases cited *supra*, note (*l*).

(*r*) *Eyre* v. *Marsden*, 2 Kee. 577; *Re Perkins*, 101 L. T. 345; but see Gray, Perp. § 706.

(*s*) 12 Bea. 104.

(*t*) 4 De G. & S. 164; 20 L. J. Ch. 109, 441; 15 Jur. 319. The reports of this case differ from one another, but the result stated in the text seems consistent with all of them. In order to simplify the statement no notice has been taken of the fact that two legacies were given in similar terms, and that part of the judgment related to one and part to the other.

Collins (*u*). There the testatrix bequeathed a fund upon trust to accumulate the income and to pay the whole fund to the eldest daughter of A, and if there should be no such daughter, then in trust for the eldest daughter of B. The testatrix died in 1819: A died in 1851 without having had any issue. B had a daughter C, who was born in 1821 and died in 1827. It was held by Romilly, M.R., that the personal representative of C was entitled to the fund and the accumulations made between 1819 and 1827, with interest at 4 per cent. per annum on the amount so ascertained up to the time of payment, and that the rest of the accumulations went to the residuary legatee.

Nature of interest which devolves to the heir.

The interest which, by the operation of the Act, results to the heir is generally either an estate *pur auter vie* or a chattel interest, and consequently if he dies while the income is in suspense, his interest passes to his executor or administrator, and not to his heir (*x*).

Effect of Thellusson Act on other statutes.

The Thellusson Act, by invalidating or stopping a disposition of the income of land, may affect the operation of other Acts of Parliament, such as the Settled Land Acts (*y*), or the Fines and Recoveries Act (*z*).

Whether insurances on lives form a mode of accumulation within the Act.

VII.—Life Insurance.—In *Bassil* v. *Lister* (*a*), Turner, V.-C., decided that a direction in a will to apply a sufficient part of the income of the testator's property in keeping up certain policies which he had effected on the lives of his children in their names, and which in case of their marriage he directed to be settled on their wives and children, was not a trust for accumulation within the statute, and was therefore valid beyond the period of twenty-one years from his death. He observes: "It was said in argument that the payment of the income to the Insurance Company was itself an accumulation; that the Company were recipients of the income for the purpose of accumulation; that what was done was the same thing as if the rents were paid to an individual, to accumulate in his hands, and to be paid over at the death of the life insured; and the case was presented to the Court in many similar points of view; but I do not see how the payment of the premiums to the Insurance Company out of the income is an accumulation of the income. The premiums,

(*u*) 16 Bea. 14; on this case see *Re Cattell*, [1914] 1 Ch. 177.

(*x*) *Sewell* v. *Denny*, 10 Bea. 315; Gray, Perp. § 702, note, where *Halford* v. *Stains*, 16 Sim. 488, is referred to.

(*y*) *Vine* v. *Raleigh*, [1896] 1 Ch. 37.

(*z*) *Re Hughes*, [1906] 2 Ch. 642.

(*a*) 9 Hare, 177. And see *Meller* v. *Stanley*, 2 D. J. & S. 183. The decision in *Bassil* v. *Lister* was followed by Chitty, J., in *Re Vaughan*, [1883] W. N. 89. See also *Re Errington*, 76 L. T. 616 (settlement by deed).

when paid to the Insurance Company, become part of their general funds, subject to all their expenses; and although it is true that the funds in the hands of the companies do generally produce accumulations, it is impossible to say what accumulations arise from any particular premium. It was said that it was an accumulation as to the estate, because the estate receives back a certain sum upon the death of the party whose life was insured; but what the estate receives back is not the accumulation of the income, but a sum payable by the office by contract with the testator; and is this an accumulation within the meaning of the statute? The history of the statute goes far to show that it is not, and I think the language of the enactment confirms that view. The enactment is, that no person shall settle or dispose of real or personal estate, so and in such manner that the rents, profits, income, or produce shall be accumulated beyond the prescribed periods; and these are words which admit of a clear, plain, common-sense interpretation, as referring to the accumulation of rents, profits, and income, *qua* rents, profits and income. Why is the Court to put a strained construction upon them, and cut down the undoubted right which existed before the statute, beyond what the language of the statute, in its ordinary interpretation, imports? It is said that the Court ought to do so, because the spirit and intent of the statute was to prevent accumulation and the suspension of the beneficial enjoyment; but this argument appears to me to beg the question; for it assumes that what the petitioner here calls an accumulation suspending the beneficial enjoyment, was an accumulation intended to be prevented by the statute. Much reliance was placed in the argument upon the mischief which might ensue from policies of insurance being resorted to for the purpose of evading the statute, if the disposition of this will were upheld, but I entertain no apprehension of any such mischief; I think that settlors and testators, who contemplate accumulation, are far too keen-sighted to incur the risks to which such a course of proceeding would be exposed. On the other hand, I see enormous mischiefs which would arise from the construction for which the petitioner contends. The case before us is but one instance of the difficulties to which such a construction would lead. If it be supported, what is to become of partnership agreements for long terms of years, where certain sums are to be drawn out annually, and the remaining profits are to accumulate and be divided at the end of the terms? What is to be done with policies of insurance on the lives of debtors (*b*)? And how is the case of a settlement

(*b*) The statute expressly excepts provisions for the payment of debts of *any* person, see 2 D. M. & G. 498.

of policies of insurance, with stock transferred in trust to pay premiums out of the dividends, to be dealt with? "

Observations on *Bassil* v. *Lister*.

The V.-C. seems here to argue that because of the mode of accumulation adopted the statute did not apply; but the terms of the statute are general, that no person shall "by deed or deeds, etc., or *otherwise howsoever*, settle or *dispose* of his property so and in such manner" that the income thereof shall be accumulated; it can scarcely therefore be said that the Act does not apply because a particular mode of accumulation is resorted to (*c*). To exclude the Act, it must be denied that there is any accumulation of income whatever; but it could not be denied, nor did the learned Judge attempt to deny, that effecting an insurance was one mode of accumulation. This answers the objection, that, "though the funds of the company might be accumulated, it would be impossible to say what part of such funds arose from any particular premiums"; an objection which affects only the mode of accumulation. The testator's estate, instead of getting back the total amount of premiums with compound interest, a sum varying in amount according to the period during which the premiums have been paid, gets back a *sum certain*, whatever that period may be. This sum is not less the result of an accumulation because it is of certain amount.

The decision was also rested on the ground that the sum paid back was in pursuance of a *contract*, and therefore not within the statute; this seems to beg the question, since, if there be an accumulation, the statute must reach it, whether it arise under a contract or by will: for its terms are general; and a person can no more contract that his income shall be accumulated beyond the prescribed limits, than he could direct by will that it should be so accumulated; indeed, if the statute does not extend to contracts, it does not touch any accumulation made by marriage settlement, for every such settlement is a contract. The question what would become of partnership agreements for long terms of years, by which a certain sum is to be drawn out and accumulated annually, may, perhaps, be answered by another question, namely, supposing such agreements not to be affected by the Act in question, what would become of them when considered with respect to the Rule against Perpetuities? An ordinary trust for accumulation, extending over a long term of years (that is, as the V.-C. must have meant, more than twenty-one years), would be void altogether as transgressing the Rule against Perpetuities (*d*); one of two things, therefore, is clear, either such agreements are not valid, or, if they are valid,

(*c*) And see the observations of Lord Cranworth, 6 D. M. & G. 462.
(*d*) *Palmer* v. *Holford*, 4 Russ. 403, *ante*, p. 356.

they are governed by rules which do not hold good with regard to ordinary trusts, and, in either case, no argument can be drawn from this source in support of the decision in *Bassil* v. *Lister*. Probably, the partnership agreements in question would be held good on the principle of the decision in *Bateman* v. *Hotchkin* (*e*), before noticed, that an accumulation which is capable at any moment of being put an end to (*f*) can infringe neither the statutory rule against accumulation, nor the common law rule against perpetuities. Lastly, as to the question what would become of settlements of policies of assurance with trusts for keeping them on foot by payment of the premiums, the answer seems to be, that they are either cases where security is given for a debt, or cases of settlement on a marriage, in which one of the settlors is the person during whose life the accumulation is to be made, both of which classes are within the exceptions of the statute under which a direct trust for accumulation would be good; and it is conceived that there is no authority for saying that any other settlement of policies of assurance are good, where a direct trust for accumulation would not also be good.

It will be observed that the remarks of the learned Judge are irrespective of the fact, that the policies were effected in the testator's lifetime; his decision was that insurance is not a mode of accumulation affected by the statute, and it would, therefore, have been the same, if the policies had been effected after the testator's death. By giving small conditional legacies, a testator could easily procure persons, after his death, to allow policies to be effected on their lives, in their names, and to assign them to the testator's trustees, than which an easier and cheaper mode of accumulation could not be devised (*g*).

The principle laid down in *Bassil* v. *Lister* has been followed in some recent cases. Thus a direction to expend surplus income in the improvement of a landed estate and in maintaining in good habitable repair houses and tenements on the property, is not affected by the Thellusson Act, but it does not authorise expenditure in building new houses, or for any purpose the

(*e*) *Ante*, p. 343.

(*f*) See *Downs* v. *Collins*, 6 Hare, 418.

(*g*) The foregoing remarks on *Bassil* v. *Lister* are printed as they stand in the fourth edition of this work, by Mr. Vincent. They were cited in *Re Vaughan*, [1883] W. N. 89, but not adopted by Chitty, J., who held that a policy of life insurance is not within the Thellusson Act. But in *Vine* v. *Raleigh*, [1891] 2 Ch., at p. 21, Chitty, J., expressed his entire agreement with the concluding observations of Turner, L.J., in *Bassil* v. *Lister*. With regard to partnership agreements, it seems clear that they are not subject to the Rule against Perpetuities, which only applies to such contracts as are specifically enforceable, and therefore create an interest in property: *London & S. W. Ry.* v. *Gomm*, 20 Ch. D. 562; Gray, Perp. § 273a, 329. [Note by Mr. C. Sweet.]

expense of which ought to be defrayed out of capital (*h*). So a direction to apply income in keeping buildings insured and repaired, and in reinstating any building destroyed by fire, is good *pro tanto* and void as to the surplus (*i*). And in a will declaring trusts of leasehold property, a direction to keep up a policy of insurance to replace at the end of the term the capital which would be lost by the falling in of the lease is good (*k*). In all these cases the direction to apply and the application of the income must be made in good faith and not for the purpose of evading the Act.

(*h*) *Vine* v. *Raleigh*, [1891] 2 Ch. 13. See *Drake* v. *Trefusis*, L. R. 10 Ch. 364.

(*i*) *Re Mason*, [1891] 3 Ch. 467.

(*k*) *Re Gardiner*, [1901] 1 Ch. 697.

CHAPTER XII.

FROM WHAT PERIOD A WILL SPEAKS.

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From what period a will speaks.

"For some purposes a will is considered to speak from its date or execution, and for others from the death of the testator: the former being the period of the inception, and the latter that of the consummation of the instrument" (*a*).

In *Randfield* v. *Randfield* (*b*), a testator prepared a will in 1837, in which certain provisions were contingent on his son attaining twenty-one; he did not execute it until 1844, before which time the son attained that age; it was held that the will must be construed without reference to the contingency.

Construction of words referring to an existing individual.

I.—Object of Gift.—As a general rule, words indicating an existing individual are considered to refer to the date of the will, and not to the testator's death. "Thus, if a testator give an estate or a sum of money to his son John, the gift will take effect in favour of his son of this name (if any) at the date of the will, and of him only. If, therefore, such son should die in the testator's lifetime, and he should afterwards have another son of the same name who should survive him, such after-born son would not be an object of the gift. And the same rule would seem to obtain if the devisee or legatee were described with reference to his filial character only, without any other designa-

Date and execution relatively considered.

(*a*) Thus Mr. Jarman, in the first edition of this work, p. 277. He adds the following note: "In this chapter, and indeed throughout the present work, the date and the period of execution are assumed to be identical; which, it is obvious, may not be the case, and then the question would arise—which is to predominate? It is conceived that, for some purposes, the date, and for others the time of execution, would do so. In regard to the will's capacity of operation on real estate (supposing, of course, the will to be subject to the old law), the period of the actual execution would be the material fact; but in regard to points of construction, the effect would sometimes, perhaps generally, depend on the date, or the time of *apparent* execution: for instance, if a testator dated his will on the 1st January 1830, and executed it on the 1st June in the same year, a bequest in such will of 'all the Three per cent. Consols now standing in my name,' possibly might be held to pass the Consols only of which he was possessed on the 1st January, and not what he had acquired between the date and execution, and which he held on the 1st June."

(*b*) 8 H. L. C. 225.

tion (*c*), as in the case of a gift to 'my son' simply, which would apply, it is conceived, to the son (if any) living at the date of the will, to the exclusion of any after-born son, though such after-born son should, by reason of the decease of the then existing son, happen to be the only person answering the description at the death of the testator" (*d*). Similarly, a gift to the child with which the testator's wife was pregnant, which child was still-born, was held not to take effect in favour of another child of which the testator's wife was pregnant at the time of his death, though the result was that all the testator's property was devised away, and the last-mentioned child left unprovided for (*e*). And a gift to "the eldest son" of A is a gift to the person who answers the description at the date of the will, as *persona designata*, so that if he dies before the testator the gift lapses (*f*).

On the same principle, where a testator bequeathed a silver cup to Lord S. and his heirs as an heirloom, and the person who was Lord S. at the date of the will died before the testator, leaving a successor to the title, it was held that the bequest lapsed (*g*).

Gifts to wife, how construed.

A question of this nature may arise on wills made before 1838, containing a gift to the wife of the testator (*h*), and on all wills containing a gift to the wife of another person, under which, on the principle just stated, the individual standing in the conjugal relation at the date of the will, would take, exclusively of any other person who might happen to answer the description at the death of the testator (*i*). Accordingly, by early writers it is laid down (*k*), that if one devise land to the wife of J. S., and J. S. die, and she take to husband J. D., and then the devisor die, she shall take the land; and yet she is not the wife of J. S. when the devisor dies, nor shall she take it as his wife; but the intent is, that she who was the wife of J. S. at the time of the making the will should have it, and the person

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(*c*) "This position, however, is advanced with some diffidence, seeing the strong anxiety of the Courts to extend, as much as possible, gifts to children." (Note by Mr. Jarman). See *Perkins* v. *Micklethwaite*, *ante*, p. 189; and *Thompson* v. *Thompson*, 1 Coll. C. C. 381, and *King* v. *Bennett*, 4 M. & W. 36, *post*, pp. 1718, 1719.

(*d*) This statement of the law by Mr. Jarman is taken from the first edition, p. 283.

(*e*) *Foster* v. *Cook*, 3 Br. C. C. 346.

(*f*) See *post*, p. 1717.

(*g*) *Re Whorwood*, 34 Ch. D. 446.

(*h*) Since the Wills Act, s. 18, the will would be revoked by a second marriage and the question could not arise. See *Pratt* v. *Mathew*, 22 Bea. 334.

(*i*) *Garratt* v. *Niblock*, 1 R. & My. 629; *Bryan's Trust*, 2 Sim. (N.S.) 103; *Franks* v. *Brooker*, 27 Bea. 635. As to the meaning of the word "unmarried," see *post*, pp. 1251 *seq.*

(*k*) See *Woodright* v. *Wright*, 10 Mod. 371; 8 Viner Abr. 309, tit. Devise, T. b. pl. 2; Plow. 344*a*.

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is clear by the description. But as Mr. Jarman points out (*l*), if J. S. had had no wife at the date of the will, it is very doubtful whether a person subsequently becoming such could have claimed under the devise, unless the description were applicable to her at the testator's death; she ought, it is conceived, to answer the description at *one* of these periods. Mr. Jarman says (*m*): "The distinctions upon the subject deducible from general principles, and the authorities just referred to, appear to be the following:—First, that a devise or bequest to the wife of A, who has a wife at the date of the will, relates to that person, notwithstanding any change of circumstances which may render the description inapplicable at a subsequent period, and, by parity of reasoning, is under *all* circumstances confined to her (*n*); but that, secondly, if A have no wife at the date of the will, the gift embraces the individual sustaining that character at the death of the testator (*o*); and, thirdly, if there be no such person either at the date of the will, or at the death of the testator, it applies to the woman who shall first answer the description of wife, at any subsequent period (*p*).

General propositions.

Whether gifts in remainder are distinguishable.

"There seems to be no ground, upon principle, for varying the construction, where the gift to the wife is by way of remainder after the death of the husband; the rule being, that the devise of an estate in remainder, to a person in a certain character, and by reference simply and exclusively to that character, vests in the person sustaining it at the death of the testator. The consequence would be, that in case the person who was wife at the death of the testator, or who subsequently became such, die in the lifetime of her husband the tenant for life, no after-taken wife, surviving him, would be entitled under the devise; since it would be impossible, consistently with the principle in question, to hold that it remained contingent until the death of the husband, or that it shifted from time to time to the several persons upon whom the character of wife successively devolved (*q*).

(*l*) First edition, p. 284. (*m*) First edition, p. 285.

(*n*) See the case of *Re Coley*, [1903] 2 Ch. 102, cited below note (*p*), which treats the general principle as unquestionable, unless there is something in the context of the will to prevent its application; as to this, see *Re Drew*, [1899] 1 Ch. 336, *post*, p. 376.

(*o*) See *Lloyd* v. *Davies*, 14 C. B. 76; and analogous cases, *post*, p. 1718, *ad fin.*

(*p*) See *Driver* d. *Frank* v. *Frank*, 3 M. & Sel. 25; 8 Taunt. 468; *Longworth* v. *Bellamy*, 40 L. J. Ch. 513; *Radford* v. *Willis*, L. R. 7 Ch. 7, and see *Boreham* v. *Bignall*, 8 Hare, 131, where, however, the words were special. The point may now be considered settled; see *Re Burrow's Trusts*, 10 L. T. (N.S.) 184; *Firth* v. *Fielden*, 22 W. R. 622; *Re Griffiths' Policy*, [1903] 1 Ch. 739; *Re Coley*, [1903] 2 Ch. 102. The decision of Malins, V.-C., in *Re Lyne's Trust*, L. R. 8 Eq. 65, is overruled so far as it professes to lay down any general rule.

(*q*) *Blount* v. *Crozier*, [1917] 1 Ir. 461.

"The doctrine here contended for, however, may appear to be encountered by the case of *Peppin* v. *Bickford* (*r*), where a testator gave to his nephew A £6,000 to be raised out of his estate, and which he directed should not be paid or payable until the day of his marriage, when it was to be laid out in the purchase of land, to be settled and conveyed to the said A and his assigns for life, and after his decease, *to and upon the wife of A for life*, and after her decease, then unto and upon the first son of A on the body of such wife to be begotten, in tail male, remainder to the other sons successively in tail male, remainder to the daughters as tenants in common in tail, remainder to the testator's brother-in-law B in fee. A was unmarried at the date of the will and the death of the testator. He subsequently married a lady, who died in his lifetime without issue. He afterwards married again, and the second wife claimed to be included in the trusts, contending that the estates were to be settled on any after-taken wife of A and his issue by such wife, in case his first wife should die without issue; and the Court so decided: Lord Loughborough said, 'If the wife had died within a month after the marriage, there could have been no issue to take the provision: and the legacy of £6,000, except as to the life interest of the nephew, would have lapsed (qu. failed?). It is impossible to ascribe such an intention to the testator' (*s*).

Executory trusts.

"In this case, the construction must, it is conceived, be referred to the special circumstances of the trust being executory, which authorised the Court to give it a liberal construction, and that, by restricting the trust in favour of the wife to the first person standing in that relation, the limitation to the issue would have been restricted to *her* children, which could hardly be the intention of the testator, who was the husband's relation."

In all cases of executory trusts, it is purely a question of intention. Thus, in *Re Parrott* (*t*), a testator bequeathed a fund to be settled upon his daughter A, "the wife of M. W.," for her life, part of the fund to be paid at her death "to her husband if living, if deceased then the whole amount is to be divided amongst her children"; it was held by the Court of Appeal that a settlement be directed, so framed as to apply to M. W. and not to any future husband, and so as to confine the trusts to the daughter's children by him. On the other hand, in *Nash* v. *Allen* (*u*), a trust to settle property upon the testator's daughter or daughters "and her or their intended husband or

(*r*) 3 Ves. 570.
(*s*) See also *Allanson* v. *Clitherow*, 1 Ves. Sen. 24; Belt's Supp. 24.
(*t*) 33 Ch. D. 274.
(*u*) 42 Ch. D. 54. The subject is discussed more in detail in Chap. XXIV *post*, pp. 879 *seq*

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husbands" and "the children of such marriage or respective marriages," was held to authorise a settlement in favour of a second husband.

Contrary intention.

Apart from the question of executory trusts, the presumption that a gift to the wife of a married person is confined to the wife living at the date of the will, may in any case be rebutted by the context. Thus, in *Re Drew* (*x*), a testator gave property upon trust to pay the income to his son B for life and after his death "to his wife" for life, and after her decease upon trust for B's children living at his decease; the will contained a provision for the cesser of B's interest on alienation or bankruptcy, and a discretionary trust in that event for the maintenance and support of B, his wife and children. B was married at the date of the will. It was held by Stirling, J., that B's second wife, whom he married after the date of the will, was entitled, on the ground that the will showed a general intention to provide for B's family.

Re Drew.

The decision in *Re Lory* (*y*) may be supported on the same ground. There a testator bequeathed property upon trust to pay the income during the life of his son to his son's wife and children in equal shares, and after his son's death to his son's widow and children in equal shares. The son was married at the date of the will, but shortly after the testator's death the son's wife died and he married again: it was held by Chitty, J., that the second wife was entitled to a share of the income.

In *Re Hardyman* (*z*) the testatrix by a will made a bequest for the benefit of the wife of A. By a codicil made with knowledge of the death of this wife she republished her will. A re-married after the death of the testatrix. It was held that his second wife was entitled to the benefit of the bequest.

Reputed wife.

Difficult questions sometimes arise where the person who claims a legacy left to the "wife" of the testator or another person is not really married to him. As a general rule, it seems sufficient that the legatee had at the date of the will acquired the reputation of a wife. Thus, where the testator had separated from his wife A (by whom he had no children), and went through the ceremony of marriage with another woman B by whom he had two children, and made a will by which he made bequests in favour of "my wife" and the two children: it was held that B took under those words (*a*). On principle it would seem that the same rule applies to a gift to "the wife" of another person;

(*x*) [1899] 1 Ch. 336.
(*y*) 7 T. L. R. 419.
(*z*) [1925] Ch. 287. See *Re Moore*, [1907] 1 Ir. 315.
(*a*) *In b. Howe*, 33 W. R. 48; *Re Brown*, 26 T. L. R. 257.

that is to say, a woman not really his wife would be entitled, if the testator believed her to be, or treated her as, his wife. But the evidence would no doubt require to be strong, and in the absence of such evidence the testator would be presumed to refer to a person properly answering the description (*b*). In *Re Lowe* (*c*) the testator made a bequest to "the present wife" of A B, "if she shall become his widow," and also made bequests to various persons by name, describing them as the children of A B; they were, in fact, the illegitimate children of A B by a woman who lived with him as his wife: it was held that she was entitled to the bequest made to "the present wife" of A B.

In considering gifts to a person as "wife" or "widow," it is necessary to distinguish three classes of cases: where the gift is to "my wife" or "the wife" or "widow" of A B; where the gift is to "my wife A" or "A the wife of B"; and where the gift is to a woman on condition of her being or remaining the widow of A B. The subject is considered in Chapter XXXV.

Divorced wife of third person.

In *Bullmore* v. *Wynter* (*d*), a testator devised property to his daughter for life, and after her death in trust for any husband with whom she might intermarry, if he should survive her, for his life; she married a man from whom she was afterwards divorced on his petition, and he married again and survived her: it was held by Fry, J., that he was entitled to a life interest. But in *Re Morrieson* (*e*), under a bequest to the testator's son for life and after his decease to "any wife" of the son, it was held by Kay, J., that a woman whom the son married and afterwards divorced was not entitled. It is difficult to support the decision in *Bullmore* v. *Wynter*.

Intended wife.

In *Schloss* v. *Stiebel* (*f*) the testator in his will referred to his intended marriage with Miss A, and among other dispositions bequeathed £3,000 "to my wife"; he died before the marriage, while still engaged to Miss A: Shadwell, V.-C., held that she was entitled to the legacy.

Gifts to classes and officials.

The general rule above referred to (*g*) does not necessarily apply where the gift is to a person holding an official position, or to a class or fluctuating body of persons. Thus a gift to the superioresses of two convents means the persons who answer

(*b*) *Re Davenport's Trust*, 1 Sm. & G. 126. If the gift had been to "A, the wife of B," A would have taken, though not really married to B, under the rule stated *post*, p. 1253; *Anderson* v. *Berkley*, [1902] 1 Ch. 936.
(*c*) 61 L. J. Ch. 415.
(*d*) 22 Ch. D. 619.
(*e*) 40 Ch. D. 30. *Re Williams' Settlement*, [1929] W. N. 170.
(*f*) 6 Sim. 1.
(*g*) *Ante*, p. 372.

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that description at the testator's death (*h*). And a simple gift to the children of A, comprises all such as are living at the testator's death (*i*), unless it is to children "now living."

"Now living."

It is hardly necessary to say that if the gift is expressly confined to members of the class "now living," that will exclude any born after the date of the will (*k*). And the words "now living" have a similar restrictive effect, even where combined with a term which could not have full effect, according to its technical import, unless used prospectively; as in the case of a devise to the heir male of the body of A "now living," under which the heir apparent of A living at the date of the will has been held to be entitled; so that the word "heir" was made to surrender its primary and proper signification, in order to give effect to the word "now," with which it stood associated (*l*).

Verbs in present tense.

On the same principle, verbs in the present tense have a similar effect in restricting a devise or bequest to the objects existing at the date of the will, though in some of the cases considerable reluctance appears to have been manifested to carry out this principle, where its effect would be inconveniently to narrow the scope of the will, by excluding any who might be presumed to be intended objects of the testator's bounty. Thus in *Ringrose* v. *Bramham* (*m*), Sir L. Kenyon, M.R., held that a bequest of £50 "to A's children, to every child he hath by his wife B," to be paid to them as they should come of age, spoke at the time the will took effect, so as to let in all the children then living. "The circumstances of the case, however," as Mr. Jarman points out (*n*), "though not expressly adverted to by his Honour, perhaps aided the construction. The testator had directed a sum of money to be placed in the hands of a person until the children came of age, which exceeded the sum which would have been necessary for the purpose if the legacy were confined to the children then in existence. In regard to gifts to children, indeed, an anxiety to include as wide a range of objects as possible has so powerfully influenced the construction, that such cases are to be regarded as *sui generis*. To this

Gifts to children.

(*h*) *Re Laffan and Downes' Contract*, [1897] 1 Ir. 469; *Re Daniels*, 118 L. T. 435 (the Lord Mayor of London for the time being); *Re Jones*, 43 T. L. R. 324. As to gifts to persons holding charitable offices, see *ante*, p. 214.

(*i*) As to the construction of gifts to classes, see Chap. XLII, and *post*, p. 408.

(*k*) *Crossly* v. *Clare*, Amb. 397.

(*l*) *James* v. *Richardson*, T. Jon. 99, 1 Eq. Ca. Ab. 214, pl. 11, 1 Vent. 334, 2 Lev. 232, Raym. 330, 3 Keb. 832, Poll. 457; *Burchett* v. *Durdant* (*Durdant* v. *Burchett*) on same will, Skin. 205, 2 Vent. 311, Carth. 154.

(*m*) 2 Cox, 384.

(*n*) First edition, p. 279.

anxiety is also to be ascribed the rule, which constitutes another exception to the doctrine under consideration, that a gift to children 'begotten' extends to children born after the date of the will; and a gift to children '*to be* begotten' includes those antecedently in existence" (*o*).

Where children take as *personæ designatæ*.

If the testator refers to a number of children in such a way as to show that he has certain individuals in his mind, they take as *personæ designatæ*, and not as a class; as where he gives a sum "to be divided between the six children of A" (*p*).

Legacies to clerks, servants, etc.

Legacies to clerks, servants, and the like, are also, as a rule, gifts to a class, and therefore those, and only those, who are in the testator's service at the time of his death, can take under such a bequest. Thus, in *Re Marcus* (*q*), the testator made the following bequest: "My office and warehouse employés, such as clerks and workmen, shall have to receive six months' full salary." It was held by North, J., that employés in the testator's service at the date of the will, but subsequently dismissed, were not entitled, and that employés who had been engaged by the testator after the date of the will, and were in his service at the time of his death, were entitled. His Lordship said: "The ordinary natural meaning of the words is 'those who were his employés at the time of his death.' If he had meant to describe the persons who were his employés at the time the will was made, nothing would have been easier than to say who they were and who were meant. But instead of adopting the obvious course in case that was intended, he does something else. He seems to consider that the employés are a class to be ascertained, and he gives the mode by which the trustees are to ascertain, when the times comes, who are the persons to take." *Jones* v. *Henley* (*r*), which decided that, under a bequest of £100 a-piece to all his servants, the testator meant only those who were continuously in his service from the date of the will to the testator's death, is quite contrary to principle. Of course, a testator may, by the context, show that under a bequest to servants he has in mind persons in his service at the date of the will. Thus in *Parker* v. *Marchant* (*s*), the testator by codicil bequeathed "to the following persons, who have lived many years in my family, *viz.*, to A £1,000, to B £1,000, to C £1,000; to the other servants, £500 each." A servant not named was, at the date of the codicil, in the testator's service, but quitted it

(*o*) Co. Litt. 20 b. See also *post*, pp. 1669 *seq.*

(*p*) *Sherer* v. *Bishop*, 4 Bro. C. C. 55; *Orford* v. *Orford*, [1903] 1 Ir. R. 121. See *post*, p. 408.

(*q*) 56 L. J. Ch. 830.

(*r*) 2 Ch. Rep. 162.

(*s*) 1 Y. & C. C. C. 290.

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before his death; it was held that she was entitled. A similar construction was adopted in *Re Sharland* (*t*).

Servants.

In *Sleech* v. *Thorington* (*u*), a testatrix bequeathed to the two servants who should be living with her at her death a sum of stock in equal shares; she had two servants in her employ when she made her will, and afterwards took another, who was in her service at the time of her death; it was held that all three were entitled, on the principle laid down in *Tomkins* v. *Tomkins* (*x*).

Other points connected with legacies to servants (including the question of compliance with an express condition of being in the testator's service at the time of his death) are considered in Chapter XXX.

Wills Act, s. 24.

Section 24 of the Wills Act, which makes a will speak from the death of the testator so far as regards his property, does not in any manner affect its construction with regard to the objects of gift (*z*).

The Wills Act, s. 24.

II.—Subject of Gift (*a*).—Wills made or republished since the year 1837 are regulated, with respect to the period from which they speak, by the Wills Act, which provides (section 24), "That every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

General devise of real estate now extends to property at death.

"This enactment must," as Mr. Jarman remarks (*b*), "be viewed in connection with section 3, which enables testators to dispose of all the real and personal estate to which they may be entitled at the time of their death, which, if not so disposed of, would devolve to their general real and personal representatives. Had the latter clause stood alone, it might have been a question whether the legislature, by merely enabling testators to dispose of after-acquired real estate, had so far varied and enlarged the construction of a general devise, as to make it extend beyond the real estate belonging to the testator when he made his will, to which the established rules of construction, no less than the principle which forbad the devise of after-acquired real estate, previously restricted it. Any such question is, of course, now

(*t*) [1896] 1 Ch. 517.
(*u*) 2 Ves. sen. 560; see Roper Leg. 182.
(*x*) Cited 3 Atk. 257; *post*, p. 1682.
(*z*) *Bullock* v. *Bennett*, 7 D. M. & G. 283; *Violett* v. *Brookman*, 26 L. J. Ch. 308. The decision in *Re Harris's Trust* (2 W. R. 689), so far as it conflicts with the rule above stated, is overruled. See the cases on gifts to eldest sons, etc., *post*, p. 1717.
(*a*) The Section on the law before the Wills Act is omitted in this edition.
(*b*) First edition, p. 288.

precluded; for by the combined effect of the 3rd and 24th sections of the statute, it is evident that a general devise of real estate (*c*) will operate on all the property of that description, to which the testator may happen to be entitled at his decease; and though it seems to have become usual in practice, to extend the devise in express terms of the real estate belonging to the testator at his death, yet this must be considered as a measure of excessive caution, and not as springing from, or sanctioning, any serious doubt as to the construction. Indeed, to hold that a general devise is still confined to real estate belonging to the testator at the date of his will, would most inconveniently narrow, and go far towards rendering nugatory, the enactment which declares the will to speak, in regard to the estate (real as well as personal) comprised in it, from the death of the testator."

So a devise of the testator's real estate in a given county or parish, will *prima facie* include all the real estate in that place to which the testator is entitled at his decease (*d*). But a general devise of lands in a particular place will, of course, not include lands subsequently purchased, where the will expressly disposes of the latter; the contrary intention spoken of in the Act is then clearly shown (*e*).

General devise of lands in particular place.

Mr. Jarman continues (*f*): "The application of the new principle of construction to specific bequests, however, is attended with more difficulty, and will, in all probability, give rise to much controversy and litigation, before its precise limits and effect are fully established. The case immediately in the contemplation of the legislature, probably, was that of a specific bequest of a renewed leasehold property, which, we have seen, under the old law, did not apply to the new estate acquired by a renewal of the lease subsequently to the will; and, also, the case of a bequest of a specific sum of stock in the funds, which, upon the same principle, did not extend to substituted stock subsequently acquired by the testator, though of precisely similar amount. The applicability of the new enactment to such cases, of course, cannot be questioned (*g*), and there is as little doubt respecting its beneficial operation."

Application of s. 24 to specific gifts.

Renewed lease.

The section applies not only to the case of a testator renewing

Purchase of reversion of lease.

(*c*) *O'Toole* v. *Browne*, 3 Ell. & Bl. 572; *Jepson* v. *Key*, 2 H. & C. 873.

(*d*) *Doe* d. *York* v. *Walker*, 12 M. & Wels. 591. Compare *Mason* v. *Ogden*, [1903] A. C. 1. As to the effect of the words "which I am seised of or entitled to," occurring in *Doe* v. *Walker*, see *post*, p. 394.

(*e*) *Re Farrer's Estate*, 8 Ir. C. L. 370.

(*f*) First edition, p. 289.

(*g*) But as to the second case put by Mr. Jarman, see *post*, p. 385.

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the lease of leasehold property bequeathed by him, but also to cases where, after making his will disposing of the demised property, the lessee has bought the reversion in fee; the newly-acquired interest passes by the will, notwithstanding a reference (commonly found in such cases) to the term for which the property is at the time held; this being considered only a mode of describing the property, and not as equivalent to saying, "I give my present interest and nothing else" (*h*). The latter meaning would equally exclude a renewed term (*i*). But, of course, the language used by the testator may show that he does not intend to give anything except his present interest (*k*).

Bequest of stock.

With regard to bequests of stock, it is clear that if there is nothing to show a contrary intention, a bequest of the testator's stock of a given description will, under the present law, include any additional stock of the same description, purchased by the testator after the date of his will. Thus in *Goodlad* v. *Burnett* (*l*), where the testatrix gave "my New Three and a quarter per cent. Annuities" to trustees, upon the trusts therein mentioned; and, after making her will, purchased a considerable quantity of that stock in addition to what she possessed at the time of making her will, it was held by Wood, V.-C., that the whole was included in the bequest. He thought the Wills Act must have some sense given to it as regarded personal estate; before that Act, there was no doubt that, as regarded the general personal estate, the will in most cases spoke from the death, but not in all; and the present was one in which the bequest would have been confined to the stock in the testatrix's possession at the time of making her will (*m*). It was precisely such a case to which the Act would seem to have application; the only question was, did a contrary intention appear by the will? There was nothing to indicate such an intention, except the mere circumstance of the testatrix having described the stock as "my Three-and-a-quarter per Cents.";

(*h*) *Struthers* v. *Struthers*, 5 W. R. 809; *Miles* v. *Miles*, L. R. 1 Eq. 462; *Cox* v. *Bennett*, L. R. 6 Eq. 422; *Saxton* v. *Saxton*, 13 Ch. D. 359. Section 23 of the Act was also relied on, as to which *vide ante*, p. 151, n. (*i*). See also *Leckey* v. *Watson*, Ir. R. 7 C. L. 157.

(*i*) See *Wedgwood* v. *Denton*, L. R. 12 Eq. 290, 295, 296.

(*k*) See *Emuss* v. *Smith*, 2 De G. & S. 722, *post*, p. 384. In *Re Knight*, 34 Ch. D. 518, a testator gave all the plate, etc., which should be in and about the dwelling-house in which he should reside at the time of his decease, "together with the lease of such house" to his wife; at the date of his will he was residing in a house which he held for a short term at a rack rent; several years afterwards he parted with the lease of that house and purchased a freehold house in which he resided at his death: it was held by North, J., that the wife was not entitled to the freehold house. See also the cases cited *post*, p. 713. See also *Blake* v. *Blake*, [1923] 1 Ir. R. 88 (after-acquired shares).

(*l*) 1 K. & J. 341. See also *Drake* v. *Martin*, 23 Bea. 89; *Trinder* v. *Trinder*, L. R. 1 Eq. 695; and *per* Jessel, M.R., L. R. 20 Eq. 312; *Re Clifford*, [1912] 1 Ch. 29.

(*m*) Compare *Banks* v. *Thornton*, 11 Hare, 176.

and where, as here, the bequest was generic (*n*)—of that which might be increased or diminished—that circumstance was insufficient (*o*). It follows that if a testator bequeaths his stock of a particular description, and after the execution of his will disposes of part of it, the balance will pass by the bequest (*p*).

Devise of "lands of C."

The same principle has been applied to a devise of land. Thus in *Strevens* v. *Bayley* (*q*), the testatrix devised to the plaintiff "the lands of Curramore," and devised all the residue of her real estate to the defendant; the townland of Curramore had originally been held in undivided moieties, and there had been a partition under which the testatrix was, at the date of her will, entitled to one portion in severalty; and after the date of her will, she purchased the other portion: it was held that the whole townland passed to the plaintiff. Monahan, C.J., who delivered the judgment of the Court, considered that the description comprised the whole townland, and, consequently, included all lands in the townland of which the testatrix was seised at her death.

So in *Castle* v. *Fox* (*r*), where a testator, being entitled to the mansion-house of Cleeve Court and lands adjoining, devised "his mansion and estate called Cleeve Court" to certain persons, and the residue of his property to certain other persons; and afterwards, at different times, bought other pieces of land, which he added to Cleeve Court, and treated and spoke of them as part thereof; Malins, V.-C., said he was required by section 24 to ask the question what it was the testator called the Cleeve Court estate at the time of his death; and finding upon the evidence that these additions were then regarded and treated by the testator as part of the estate, he held that they passed as such under the specific devise.

(*n*) Although the description of the stock was generic, the legacy was specific: see *Bothamley* v. *Sherson*, L. R. 20 Eq. 304, and other cases cited *post*, pp. 1027 *seq.* So *Re Bancroft*, [1928] 1 Ch. 577 ("my rights in connection with" a play).

(*o*) *Trinder* v. *Trinder*, L. R. 1 Eq. 695, is to the same effect.

(*p*) *Re Slater*, [1906] 2 Ch. 480; [1907] 1 Ch. 665. Compare *Re Gillins*, [1909] 1 Ch. 345, distinguished in *Re Clifford*, [1912] 1 Ch. 29.

(*q*) 8 Ir. C. L. R. 410.

(*r*) L. R. 11 Eq. 542. See *Webb* v. *Byng*, 1 K. & J. 580, a very similar case, where the after-acquired property was held not to pass through insufficiency of evidence to prove that it was regarded by the testatrix as part of the estate devised. Citing this case, R. P. S., p. 372, Lord St. Leonards says, "consider this case." As to the admissibility of such evidence, see *S. C.* and other cases *post* [Chap. XV]. (Note by Mr. Vincent in the 4th ed. of this work.) But it is not clear that this was the ground of the decision in *Webb* v. *Byng*, or that the operation of a specific devise in general terms depends on intention, any more than does the operation of a residuary devise or bequest; for in most cases a testator does not contemplate the possibility of a specific gift failing through lapse, remoteness, &c., and yet if it does, the property passes under the residuary gift. In *Castle* v. *Fox*, the V.-C. seems to have attributed too great potency to section 24; see *post*, p. 387.

Another example of the effect of a general description is to be found in *Everett* v. *Everett* (*s*), where a testator by will released his son from certain specified debts and "all other moneys due from him to me": it was held that these words released the son from moneys lent to him by the testator after the date of the will.

So where (*t*) a testator bequeathed all his share and interest in a partnership business and in the real and personal estate employed or invested therein to trustees upon trust to continue the business at the discretion of his wife, and to pay to her a sum equal to a share in the profits of the business; the testator afterwards acquired the whole of the business: it was held by Bacon, V.-C., that the whole business passed and that the widow was entitled to the whole of the income.

Emuss v. *Smith.*

But, as already mentioned (*u*), the testator may use language showing that he had specific property in his mind. Thus in *Emuss* v. *Smith* (*x*), it was held that a devise of "all my freehold estate at Brickhouse Lane which I purchased of B" by a testator who had before making his will purchased of B an estate in that lane, partly freehold and partly leasehold, did not pass the reversion in fee, afterwards purchased from C, of the part theretofore leasehold (*y*).

Gift of property derived from a specified source.

The cases in which it has been held that property may pass under a generic description (*e.g.*, "the property to which I am entitled under the will of X"), even if its state of investment is changed by the testator, are considered elsewhere (*z*).

Bequest of specified sum of stock, or number of shares, may be general,

Gifts of specific sums of stock, or of a particular number of shares in a certain company, give rise to more difficulty. As a general rule, a bequest of a sum of stock without more (*e.g.*, "I bequeath to A £1,000 2½ per cent. Consols") is a general bequest. So a bequest of "20 shares in the A company" is *prima facie* a general legacy. If, therefore, the testator has 20 shares of £50 each at the date of his will, and they are afterwards converted into 100 shares of £10 each, the legatee only gets 20 £10 shares (*a*). On the other hand, a bequest of "my £1,000 Consols" or "my twenty shares in the A company" is specific, and it may be that if these shares in the company are substituted

or specific.

(*s*) 7 Ch. D. 428.
(*t*) *Re Russell*, 19 Ch. D. 432.
(*u*) *Ante*, p. 384.
(*x*) 2 De G. & S. 722.
(*y*) *Cave* v. *Harris*, 57 L. J. Ch. 62, is to the same effect. The principle involved in these decisions was disregarded by Romilly, M.R., in *Drake* v. *Martin*, 23 Bea. 89 ("foreign securities as invested by Mr. W. L., broker"). The decision in *Cooch* v. *Walden*, 46 L. J. Ch. 639, is too shortly reported to be of any value.
(*z*) *Post*, p. 1051.
(*a*) *Re Gillins*, [1909] 1 Ch. 345; *Re M'Afee*, [1909] 1 Ir. R. 124.

they will pass. Thus in *Re Clifford* (*b*) the testator bequeathed to his trustees twenty-three of the shares belonging to him in the L company upon certain trusts. At the date of his will he held 104 shares of £80 each. These were subsequently subdivided into £20 shares so that at his death he held 416 £20 shares. It was held that the subject-matter of the bequest remained in substance though changed in name and form and that 92 of the £20 shares passed by the bequest. This principle was extended in *Re Leeming* (*c*) where on a reconstruction shares in a new company were substituted for those in the old company.

Shares subdivided.

Shares substituted.

In *Re Kuypers* (*d*) the testatrix bequeathed 600 15 per cent. cumulative preferred ordinary shares in the L company to trustees upon trust for F for life. Subsequently (in the life of the testatrix) the company substituted for each such share an 8 per cent. A cumulative preference share and an 8 per cent. cumulative preferred ordinary share paid for in full out of reserves. It was held that F was only entitled to the income of 600 8 per cent. cumulative A preference shares, which were really the original 600 15 per cent. cumulative preferred ordinary shares, with an altered name and a reduced right to dividends.

Further shares paid for out of reserves.

Mr. Jarman, as already mentioned (*e*), thought that if a testator made a bequest of a specific sum of stock (by which he obviously meant a specific bequest of a certain sum of stock (*f*)), and then sold the stock, and afterwards acquired a precisely similar amount, the latter stock would pass by the bequest. The point does not seem to have been decided, but it is submitted that Mr. Jarman's contention is not well founded. For if a testator bequeaths "my £1,000 Consols," or "the £1,000 Consols standing in my name," he obviously has in mind a particular investment, and does not mean to dispose of an investment which he may make at some future time. In *Re Gibson* (*g*), Wood, V.-C., laid down the general principle

The Act not applicable to specific bequest of stock of a definite amount;

(*b*) [1912] 1 Ch. 29; *Re Greenberry*, 55 Sol. J. 633; *Re Faris*, [1911] 1 Ir. R. 165 (bonus shares).

(*c*) [1912] 1 Ch. 828.

(*d*) [1925] 1 Ch. 244; see also *Re Anderson*, [1928] W. N. 46 (railway amalgamation scheme).

(*e*) *Ante*, p. 381, where Mr. Jarman's views on the application of section 24 to specific bequests are quoted.

(*f*) See the instance put by him of the effect of a bequest under the old law of a "sum of £1,000 consols standing in my name," *ante*, p. 381.

(*g*) L. R. 2 Eq. 669. A similar decision was come to by the V.-C. in *Goodlad* v. *Burnett*, 1 K. & J. 341. A bequest of railway "shares" generally includes railway stock: *Morrice* v. *Aylmer*, L. R. 7 H. L. 717. In *Re Gibson*, Wood, V.-C., referred to Lord Hardwicke's doctrine in *Avelyn* v. *Ward*, 1 Ves. sen. 423, that the substitution of one entire fund (not purchased bit by bit) for another of equal amount was a revival of the bequest. But since 1 Vict. c. 26, a bequest of personalty once adeemed cannot be revived by parol.

thus: "When you find a mere specific thing, incapable of increase or diminution, in existence at the date of the will, but not in existence at the time of the testator's death, there is a sufficient indication upon the will of the 'contrary intention' to which section 24 refers, to prevent the operation of the rule which makes the will speak from the death of the testator." In that case a testator, having £1,000 N. B. Railway stock, bequeathed "my one thousand N. B. Railway shares," and afterwards sold his £1,000 stock, and at various times bought stock and shares of the N. B. Railway exceeding the amount bequeathed, and was possessed of them at his death; Wood, V.-C., said the testator had distinctly referred to one thing in his will which was no longer in existence at the time of his death: that thing and that only could be considered as the subject of the bequest. The bequest was therefore adeemed. This in principle covers a case where the substituted stock is exactly equal to the original subject of bequest.

nor to release of a specific existing debt.

Again in *Sidney* v. *Sidney* (*h*), the testator recited, as the fact was, that his son owed him £1,440 or thereabouts, secured by bills, notes or otherwise (the precise amount was £1,400), and released him from the payment of interest up to the time of the testator's death; this debt was afterwards paid off, but another of £1,290 was incurred, which was partly secured by notes and partly unsecured, and which remained due at the testator's death. Jessel, M.R., held that the will meant to describe a specific sum then existing, and that consequently it could not, under section 24, be read as speaking at the time of the testator's death, so as to include a new subject, *viz.*, the interest on the new debt. The legacy was therefore adeemed (*i*).

Re Lane.

In *Re Lane* (*k*), the testator bequeathed "all my debentures in the S. company"; at the date of the will he held certain debentures of that company which were afterwards converted into debenture stock: it was held by Hall, V.-C., that the stock did not pass by the bequest, on the ground that the two things were substantially different. But in *Re Herring* (*l*), Joyce, J.,

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(*h*) L. R. 17 Eq. 65. It should be noticed that the case of *Smallman* v. *Goolden* (1 Cox, 329), on which the M.R. partly relied, was before the Wills Act. See *Everett* v. *Everett*, 7 Ch. D. 428.

(*i*) See also *Maxwell* v. *Maxwell*, L. R. 4 H. L. 506, as to expressions showing an intention to refer only to the state of circumstances existing at the date of the will. A bequest, if specific under the old law, is specific also under the new. The Wills Act, s. 24, gives it an enlarged operation; but the nature of the bequest is not altered. See *Bothamley* v. *Sherson*, L. R. 20 Eq. 313; *Re Gray*, 36 Ch. D. 205, where Kay, J., considered what would have been the result if the bequest had been specific. These and other cases are discussed in the chapter on Legacies

(*k*) 14 Ch. D. 856.

(*l*) [1908] 2 Ch., at p. 499.

expressed the opinion that the case fell within section 24 of the Wills Act.

Mr. Jarman's view of s. 24 as applied to specific gifts.

Mr. Jarman seems to have anticipated that section 24 of the Wills Act would have a wider operation than it in fact has. He remarks (*m*): "The new rule of construction, however, will, according to the general terms in which the enactment is framed, apply to many cases in which its effect will be less decidedly salutary, nay, where it will, in all probability, defeat the intention; for example, suppose that a testator, having a house in Grosvenor Square, bequeaths it by the description of his messuage in such square, and afterwards sells the property, and purchases another house in the same square, of which he is possessed at his decease, the bequest will, it should seem, comprise the new acquisition by force of the enactment which makes the will speak from the death. So (to put a stronger case), suppose that a testator, having a small farm in the parish of A, devises all that his estate in the parish of A, and that, subsequently to the will, he disposes of the farm in question, and purchases another in the same parish, but of ten times the value, which he continues to hold until his decease, or such larger farm may have devolved on the testator by descent or otherwise without any spontaneous act on his part, or even without his knowledge, or when incapable of altering his will; in either case the newly-acquired estate must, it is conceived, be held to pass by the devise" (*n*).

Where a contrary intention is shown by nature of specific gift.

As regards the former of the two illustrations given by Mr. Jarman, the exact case does not seem to have come before the Courts, and the *dicta* on the point are not consistent. Thus in *Castle* v. *Fox*, Malins, V.-C., expressed a decided opinion that Mr. Jarman's view was correct, and that the subsequently-acquired house in Grosvenor Square would pass by the devise: "I have not a doubt about it" (*o*). But other Judges have striven to find a reasonable meaning in the Act.

Contrary intention indicated by nature of a specific gift.

"Suppose," said Knight-Bruce, V.-C. (*p*), "a man to have a brown horse and bequeath it, and then to sell it and buy another brown horse, and die, does the horse of which he was possessed

(*m*) First edition, p. 289. It will, of course, be remembered that the first edition of this work was published seven years after the passing of the Wills Act.

(*n*) The terms of gift here supposed are more particular than those in *Doe* d. *York* v. *Walker*, 12 M. & W. 591.

(*o*) L. R. 11 Eq., at p. 551.

(*p*) *Emuss* v. *Smith*, 2 De G. & S. 722. But if a breeder of horses should bequeath "his yearlings," and survive into the next year, the yearlings of the latter year and not those of the former (now two-year-olds) would probably be held to pass. [Note by Mr. Vincent, in the fourth edition of this work.]

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at the time of his death pass?" Or suppose a man to have a picture, say, of the Holy Family, by some inferior artist, and to bequeath it as "my Holy Family," then to sell it, and afterwards to acquire a far better one on the same subject painted by an eminent artist: Wood, V.-C., thought it would be a monstrous construction to hold that the latter picture would pass; and he observed that where there was a distinct reference to a distinct and specific thing incapable of increase or diminution, and not to a genus, there was an indication of a contrary intention sufficient to exclude the rule which makes the will speak from the testator's death (*q*). If the question should ever arise, it may be expected that the desire to avoid a "monstrous" result will exercise a preponderating influence on its determination. It is submitted that the true principle is that laid down by Jessel, M.R., in *Sidney* v. *Sidney* (*r*), namely, that the first question to be considered is, what does the will mean; and by Lindley, L.J., in *Re Portal and Lamb* (*s*): "It [section 24] does not say that we are to construe whatever a man says in his will as if it were made on the day of his death."

"My piano."

In *Re Sykes* (*t*), a gift of "my piano" was held to refer to the piano the testatrix possessed at the date of the will, so that the piano she possessed at her death, but not at the date of the will, did not pass under the bequest.

"My present lease."

In *Re Reeves* (*u*), the testator, who had a short lease, bequeathed it to his daughter. He afterwards acquired a renewal of the lease and subsequently by a codicil confirmed his will. It was held that the renewed lease passed under the bequest.

It seems clear that if the description of the thing devised or bequeathed does not exactly cover the thing owned by the testator at the time of his death, the latter will not pass by the mere effect of section 24. The case of *Sidney* v. *Sidney* (*x*) is an example of this principle.

Mis-description.

But if the description was inaccurate at the date of the will, no question arises as to the operation of section 24. Thus in *Goodlad* v. *Burnett* (*y*), a testatrix bequeathed "my four

(*q*) *Re Gibson*, L. R. 2 Eq. 669. The Vice-Chancellor had previously expressed the same opinion in *Goodlad* v. *Burnett* (1 K. & J. 341). See *Macdonald* v. *Irvine*, 8 Ch. D. 101.

(*r*) L. R. 17 Eq., at p. 68.

(*s*) 30 Ch. D., at p. 55. Followed by Joyce, J., in *Re Evans*, *post*, p. 389. On this principle, the decision in *Denholm's Trustees* v. *Denholm*, [1908] Sess. Ca. 43, seems difficult to justify.

(*t*) [1927] 1 Ch. 364.

(*u*) [1928] 1 Ch. 351.

(*x*) L. R. 17 Eq. 65, stated *ante*, p. 386.

(*y*) 1 K. & J. 341. This decision was relied on by Joyce, J., in *Re Slater*, [1906] 2 Ch. 480; [1907] 1 Ch. 665, but in that case the exchange took place after the date of the will.

Danish bonds" for four specified amounts; she had not, at the date of her will or at her death, any Danish bonds of those amounts, but she had, at the date of her will and at her death, Danish bonds which she had taken in exchange for bonds bought by her late husband at prices corresponding to the four specified amounts; it was held by Wood, V.-C., that this was a case of misdescription, and that the exchanged bonds passed by the bequest.

Where after-acquired property does not answer description in will.

A case somewhat similar to the second illustration given by Mr. Jarman is *Re Portal and Lamb* (*z*). There the testator devised to his son his cottage and land at S; at the date of the will he had a small cottage with land held with it, and he subsequently contracted to purchase a house of considerable size with land adjoining the land held with the cottage; it was held by the Court of Appeal (overruling Kay, J.) that the after-acquired property did not pass by the devise. In this case there were words referring to the land held with the cottage which showed beyond all question that the testator only intended to devise that property to his son. "It is said that we are precluded by the section [24] from giving effect to this plain intention. I am always unwilling to strain this Act or any other Act in such a way as to defeat a man's plain intention. The object of this section was not to defeat, but to give effect to, the testator's intention" (*a*).

Where description of property is altered after date of will.

Conversely, in *Re Evans* (*b*), it was held that the effect of a specific devise of property, by a clear and unambiguous description, was not cut down by an alteration in the property made after the date of the will.

Result of modern decisions.

These two decisions have, it is to be hoped, disposed of the notion that section 24 requires a will to be construed as if it were made on the day of the testator's death, and show that Mr. Jarman's apprehensions as to the effect of the section were not well founded, in cases where the description of the property is specific (*c*).

What is a contrary intention.

The principle is thus stated by Joyce, J.: "There may be such a specific description of the subject of a gift as to show that what was intended to pass, whether real or personal estate, was some particular thing in existence at the date of the will. When, however, the description is generic, as 'all my lands in the county of X.' the subject of the devise being capable of increase or diminution, all the testator's lands in the county of X. at the

(*z*) 27 Ch. D. 600; 30 Ch. D. 50.

(*a*) *Per* Lindley, L.J., 30 Ch. D., at p. 55. Other passages in the judgment are cited and commented on in *Re Gillins*, [1909] 1 Ch. 345.

(*b*) [1909] 1 Ch. 784. Compare *Re Edwards*, 63 L. T. 481, *post*, p. 392.

(*c*) *Cave* v. *Harris*, 57 L. J. Ch. 62.

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date of his death will pass; and where there is such a particularity in the description of the subject of a gift as to shew that it was some object in existence at the date of the will that was intended to pass, it is considered that there is sufficient evidence of a contrary intention to exclude the application of the provisions of s. 24" (*d*).

The decision in *Re Champion* (*e*) is referred to later (*f*), with reference to the effect of the word "now," and also in another chapter (*g*), because it turned on the effect of republication by codicil.

Examples of operation of s. 24.

In *Re Potter* (*h*) effect was given to section 24. There the testator, who owned two houses, X and Y, each with land attached, by his will devised them to different persons; after the date of his will he leased X, without the adjoining land, to a tenant for twenty-one years, and retained in his own occupation Y and the piece of land adjoining X: it was held by Cozens-Hardy, J., that the piece of land adjoining X did not pass by the devise of X, but formed part of Y. The case seems near the line, for the description was specific rather than general.

So in *Re Butlin's Estate* (*i*), there was a specific devise of land which at the date of the will was subject to a charge for £950; after the date of the will the testator acquired this charge under such circumstances as to show that he intended it to merge: it was held that the devise passed the land free from the charge.

Operation of section 24 on doctrine of ademption.

In *Re Slater* (*k*), section 24 of the Wills Act was treated as forming the basis of the doctrine of ademption. In that case the testator bequeathed the interest arising from "money invested in the Lambeth Waterworks Company"; after the date of the will the testator's Lambeth Waterworks Company stock was converted into stock of the Metropolitan Water Board: it was held that the bequest did not operate on the new stock, and section 24 was treated by Joyce, J., and the Court of Appeal as governing the case. But would not the result have been the

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(*d*) *Re Evans*, [1909] 1 Ch. 784, at p. 786, quoted with approval by Lawrence, J., in *Re Davies*, [1925] 1 Ch. 642, at p. 650. Whether a devise of pits of clay would carry pits opened between the date of the will and the death of the testator was discussed in *Brown* v. *Whiteway*, 8 Ha., at p. 450.

(*e*) [1893] 1 Ch. 101.

(*f*) *Post*, p. 392.

(*g*) *Ante*, p. 188.

(*h*) 83 L. T. 405. If the testator had described the property with reference to its condition or occupancy at the date of the will, the result would have been different; see *Re Edwards*, 63 L. T. 481, and other cases cited *post*, p. 392.

(*i*) [1907] 1 Ir. R. 159.

(*k*) [1906] 2 Ch. 480; [1907] 1 Ch. 665; *Re Clifford*, [1912] 1 Ch. 29; *Re Alexander*, [1910] W. N. 36.

same if section 24 had never been enacted (*l*)? The case did not fall within *Oakes* v. *Oakes* or *Morrice* v. *Aylmer* (*m*).

Effect, where there is more than one subject of gift at the death of testator.

The decision in *Re Portal and Lamb* also seems to answer another difficulty felt by Mr. Jarman as to the effect of section 24. "It may even happen," he thought (*n*), "that by a strict application to specific gifts, of the principle which makes the will speak from the death, a gift of this nature might be invalidated for uncertainty. For instance, if a testator, having a house in the Strand, devises it by the description of his house in the Strand, and afterwards acquires another in the same place, and holds both houses at the time of his decease, it is evident that the statutory provision would, in such a case, by bringing both the houses within the terms of the description, render the devise void for uncertainty; unless it could be ascertained by extrinsic evidence which of them was intended (*o*). To avoid such a consequence, probably it would be held that the fact of the testator's ownership of one house only at the date of the will was a sufficient indication of his meaning that house; and yet this is, *pro tanto*, a departure from the principle of the enactment under consideration; for had the devise been in terms of the house in the Strand which should belong to the testator at his decease, there would have been no ground for distinguishing between the house that belonged to him when he made his will, and that which he subsequently acquired: so that, if the extrinsic evidence failed to show which of the two houses was intended (if, indeed, evidence is admissible in such a case (*o*)), the plurality would be fatal to the devise."

Whether section 24 makes words of present time point to testator's death.

"Another question," Mr. Jarman remarks (*p*), "will be whether the enactment which makes the will speak from the death will have the effect of carrying forward to that period words pointing at present time. For instance, supposing a testator to bequeath 'all that messuage in which I *now* reside,' and that subsequently to the making of his will he changes his residence to another house belonging to him, which he continues to occupy until his death; does the Act make the word 'now' apply to the house occupied by the testator at his death? It is conceived that the principle will not be carried such a length, and that this would be considered as a case in which 'a contrary intention appears by the will.'"

(*l*) See Roper, Leg. 329, where the true principle is stated.
(*m*) See *post*, p. 1054.
(*n*) First edition, p. 290.
(*o*) See Chap. XV, *post*, pp. 492 *seq.*
(*p*) First edition, p. 291.

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Re Edwards.

Effect was given to the word "now" in *Re Edwards* (*q*), where a testator bequeathed to A "my leasehold house and premises . . . where I now reside." After the date of the will part of the building was cut off from the rest and let to a tenant: but it was held that the whole passed under the bequest. This case was the converse of those which usually arise under section 24.

Re Champion.

On the other hand, in *Re Champion* (*r*), where a testator devised land which he described as being "now in my own occupation," North, J., held that the words were not a vital part of the description, and that the devise passed some land purchased and occupied by the testator after the date of the will; but the Court of Appeal, without expressly dissenting from this view, decided the case on the ground that the testator had republished his will by a codicil made after the purchase of the additional land.

Cole v. *Scott.*

Even where the words describing the subject of gift are general, yet if they expressly point to the present time, and are manifestly used with reference to the period when the will is made (*s*), the operation of the Act is excluded. Thus, in *Cole* v. *Scott* (*t*), where by will, dated April 29, 1843, the testator, after devising, "the house in which I now reside," and also making another devise of the "residue and remainder of my messuages, &c., whereof I am now seised or possessed," also devised and bequeathed "all such manors, &c., as well freehold as copyhold and leasehold, as are now vested in me, or as to the said leasehold premises shall be vested in me at the time of my death, as trustee or mortgagee," the question was whether after-purchased property passed under the residuary devise; and it was held by Shadwell, V.-C., and, on appeal, by Lord Cottenham, C., that the after-purchased property did not pass. Both Judges, especially the former, relied on the contrasted use of words importing a distinction between the estates then vested in the testator and those he might thereafter acquire, and concluded that the word "now" must be referred to the date of the will. If the will had been undated, the L.C. thought (for reasons not expressed) that "now" must under the Act be referred to the time of the death.

(*q*) 63 L. T. 481.

(*r*) [1893] 1 Ch. 101; *Re Willis*, [1911] 2 Ch. 563 (house in which I now reside); *Re Horton*, [1920] 2 Ch. 1 (copyholds now held by me); *Re Ashburnham*, 107 L. T. 601 (effects at present at A lodge).

(*s*) See Sugd. R. P. S., p. 372.

(*t*) 16 Sim. 259; 1 M. & Gord. 518. See also *Douglas* v. *Douglas*, Kay, 400. *Cole* v. *Scott* was disapproved by Malins, V.-C., in *Castle* v. *Fox* (*ante*, p. 387), but treated by the Court of Appeal as a binding authority in *Re Ord*, 12 Ch. D. 22.

But whether the will is dated or not, *Cole* v. *Scott* is not an authority for giving to the word "now" the effect of excluding after-acquired property in every case in which the testator gives that of which he is "now seised" or "now possessed." Thus in *Wagstaff* v. *Wagstaff* (*u*), a gift of "all my ready money, shares, freehold property, plate, pictures and any other property that I may now possess, except the house at P.," was held by Romilly, M.R., to include all the personal property of the testator at his death. He appears to have thought there was no difference between the words "I possess" and "I now possess." As a matter of grammar, both, it is true, express the present time; but upon the question of indicating a contrary intention within the Act, the introduction of the word "now" seems to go much further towards indicating an intention to give only what the testator has at the time (*x*). Something more than this single word, however, will generally be wanted for that purpose: some more pointed distinction must be drawn (at least in the case of a general gift) between what belongs to the testator at one time and what belongs to him at the other. And "now" has never been so construed since the Act as to produce intestacy (*y*).

Re Midland Railway Company.

Again, in *Re Midland Railway Company* (*z*), where a testator gave "all that my messuage situate in Bordgate in Otley, wherein my son D. now resides, with the stables and appurtenances thereto belonging and therewith occupied," and afterwards bought a piece of land adjoining the house, which he attached to it as a garden; it was held by Romilly, M.R., that the garden passed with the house. In his opinion it was as if the testator had said, "I give my farm Whiteacre, now in the occupation of J. S.": but he added that if the devise had been of "the messuage as it now stands, and the lands now held therewith by D.," it would not have included the after-acquired garden.

Is reference to occupation an essential part of description?

In the case first put by the M.R., the reference to occupation is not an essential part of the description (*a*): in the second it is; the subject of gift cannot be identified without it, and the word "now" would confine the gift to land so occupied at the date of the will (*b*).

(*u*) L. R. 8 Eq. 229.

(*x*) See *per* Turner, L.J., 8 D. M. & G. 437.

(*y*) See especially *Hepburn* v. *Skirving*, 4 Jur. (N.S.) 651, a strong decision, especially as to the bank shares.

(*z*) 34 Bea. 525. That a devise of a house will generally carry the garden, see *post*, p. 1258.

(*a*) See *Chamberlain* v. *Turner*, Cro. Car. 129.

(*b*) *Hutchinson* v. *Barrow*, 6 H. & N. 583; *Williams* v. *Owen*, 2 N. R. 585; *Re Edwards*, 63 L. T. 481.

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Verbs in present tense.

But it is clear that words which merely import but do not emphatically refer to time present, as a general devise or bequest of property, or of property of a particular genus, of which I "am seised" or "am possessed," will generally include all or all of that genus to which the testator is entitled at the time of his death, though acquired after the date of the will (*c*). And the effect of the statute ought not to be frittered away by catching at doubtful expressions for the purpose of taking a case out of its operation (*d*). Thus in *Lilford* v. *Powys Keck* (*e*), where a testator devised all the freeholds "of which I am seised," and then devised to corresponding uses all the copyhold and leasehold property "of which I am or at the time of my death shall be possessed"; it was held by Romilly, M.R., that after-purchased freeholds passed by the former devise. So in *Re Ord* (*f*), where a testator, possessed of leaseholds at C, part of which was charged with a mortgage and the rest with an annuity, devised all his leasehold lands at C, charged with the mortgage debts charged thereon, "and also with the annuity now charged thereon," to his son; and afterwards bought other leasehold lands at C; it was argued that the devise was confined to such leaseholds as were charged with the mortgage and annuity, a construction which of course excluded the after-bought lands; but it was held by the Court of Appeal, affirming the decision of Hall, V.-C., that the reference to the charges (which was not quite accurate) was insufficient to deprive the words of gift of their proper interpretation under the Act.

Practical suggestion.

"In order to avoid all such questions," as Mr. Jarman remarks (*g*), "a testator should introduce into his description of property specifically disposed of, expressions incapable of being applied, or not likely to apply, to any other. He should give the 'house No. 23 in Grosvenor Square,' or 'his farm in the parish of A called B, now in the occupation of C' (all which particulars could hardly coincide in two instances), or all his lands in the county of C to which he is entitled at the date of his will. The latter restriction seems in general the best, as it precludes the possibility of after-acquired property being let in."

Is section 24 applicable to property excepted from devise?

It has hitherto been assumed, and the assumption pervades all the cases, that the words of the Act: "every will shall be construed, with reference to the real and personal estate com-

(*c*) *Doe* d. *York* v. *Walker*, 12 M. & Wel. 591; *Lady Langdale* v. *Briggs*, 3 Sm. & Gif. 246; 8 D. M. & G. 391.
(*d*) *Per* Cotton, L.J., *Everett* v. *Everett*, 7 Ch. D. 428.
(*e*) 30 Bea. 300.
(*f*) 12 Ch. D. 22.
(*g*) First edition, p. 291.

prised therein, to speak and take effect as if," &c., are not to be taken in their literal sense as meaning "real and personal estate then actually comprised therein," (*i.e.*, devised thereby). It is plain that this sense was not intended, for the context shows that the enactment has reference to property not then actually comprised in the will (*h*). The true meaning appears to be "with reference to the question what estates are comprised in any disposition in the will." If this is so, it disposes of a point raised and left unsettled in *Hughes* v. *Jones* (*i*), namely, whether the enactment is applicable to exceptions from a devise. To hold that it is, would (it was argued) be to make the will speak from the death with reference to property excluded from it, whereas the Act makes it so speak only with reference to property comprised in it. This argument proceeds upon a mistake. The whole question is, what is comprised *in the terms?* This cannot be answered without taking into consideration and construing all the terms of the description, as well those which exclude as those which include. And if a man devises all his real estate except his copyholds or except his estates in the county of B, or bequeaths all his stock except consols, good sense requires that both parts of the description, being equally general or generic, should be construed to speak as from the same time. If the exception, or exclusive portion, refers to an actually existing state of things, it must, of course, be construed to speak as from the date of the will, just as inclusive terms having a similar bearing must be construed. If the will goes on to make a distinct disposition of the excepted property, with the result that what is excluded from one devise is included in the other, the question (if question it is) can hardly be said to arise (*k*).

Powers of appointment.

The effect of section 24 on appointments under powers is considered in another chapter (*l*).

(*h*) See *per* Turner, L.J., 8 D. M. & G. 436 (where the word "is" is misplaced, see 26 L. J. Ch. 49). The words of the Act appear to have been hastily adopted from the "propositions" of the 4th R. P. Report, p. 80. They require to be read with the report, which says (p. 24): "We propose that a will shall pass property of any description comprised *in its terms* which a testator may be entitled to at the time of his death, unless a contrary intention shall appear by the will. If this recommendation be adopted the law respecting the time from which a devise of freehold or copyhold estate is to be considered to take effect will be precisely similar to that which is at present in force as to personal estate." And this recommendation is referred to as follows (p. 29): "If *as we have proposed* wills be made to speak with reference to the property comprised in them as at the time of the testator's death," etc.

(*i*) 1 H. & M. 765.

(*k*) See *Lysaght* v. *Edwards*, 2 Ch. D. 521, 522; *Re Scarth*, 10 Ch. D. 499, better reported 40 L. T. 184. (The above paragraph, as to property excepted from a devise, with the notes, is taken verbatim from the fourth edition of this work, by Mr. Vincent.)

(*l*) Chap. XXIII, *post*, pp. 785, 807, 808.

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Section 24 does not supply testamentary capacity.

III.—As to Testamentary Capacity, &c.—The 24th section of the Wills Act does not in any manner affect the question of testamentary capacity. Thus although the will of a woman, under coverture at the time of making it, may operate by force of section 24 to dispose of separate property afterwards acquired by her (*m*), or as the execution of a general power afterwards conferred upon her (*n*), the will of a married woman, dying before December 5, 1893, acquires no validity under this section by the mere fact of her having survived her husband and being discovert at the time of her death (*o*). The statute does not make an instrument valid which through the personal disability of the testator was invalid in its inception. Hence if a married woman, dying before December 5, 1893, made a will during coverture and survived her husband, the will was inoperative to dispose of property acquired by her after her husband's death, unless she re-executed or republished it (*o*). And the Married Women's Property Act, 1882, did not alter the law in this respect (*p*). But as regards women dying after December 5, 1893, the law has been altered by the Married Women's Property Act, 1893, which dispenses with the necessity of re-execution or republication in the cases above referred to (*q*).

Where there is a change in the law between will and death.

If, after the execution of a will, a statute is passed which produces an alteration in the effect of the will, and the testator leaves the will unaltered, the question arises whether he intends that it shall take effect according to the altered law. It is clear that if the alteration of the law is one which merely affects the administration of the testator's estate (as in the case of the Apportionment Act, 1870), it applies to the estate of a testator whose will was made before the law was altered (*r*). But a statute does not, as a general rule, alter the construction of words contained in a will made before the Act was passed : thus a bequest to A of the dividends on a specific sum of stock, contained in a will made before 1870, gives the accrued and accruing dividends to A (*s*).

Does not affect construction.

Distinction where testamentary

But in *Re Bridger* (*t*), a testator, by will made in June, 1891,

(*m*) *Willock* v. *Noble*, L. R. 7 H. L., p. 599.
(*n*) *Thomas* v. *Jones*, 2 J. & H. 475; 1 D. J. & S. 63.
(*o*) *Willock* v. *Noble*, *supra; In b. Wollaston*, 32 L. J. P. 171.
(*p*) *Re Price*, 28 Ch. D. 709.
(*q*) See above, p. 59.
(*r*) *Lawrence* v. *Lawrence*, 26 Ch. D. 795. See *Hasluck* v. *Pedley*, L. R. 19 Eq. 271, and *Constable* v. *Constable*, 11 Ch. D. 681; in each of those cases the testator made a codicil after the Act came into operation.
(*s*) *Jones* v. *Ogle*, L. R. 8 Ch. 192. The same principle was acted on in *Re March*, 27 Ch. D. 166, although it appears from subsequent decisions that the statute in question in that case has not, in fact, altered the law. See *Re Jupp*, 39 Ch. D. 148, *post*, p. 1764.
(*t*) [1894] 1 Ch. 297; *Re Hume*, [1895] 1 Ch. 422; *Re Harris*, [1912] 2 Ch. 241.

capacity is increased.

gave "such part of my residuary trust estate which may by law be given to charitable purposes unto the Brompton Hospital" and as to the remainder to A. The Mortmain and Charitable Uses Act, 1891, was passed on August 5, 1891, and the testator died in 1892 : it was held that the Act applied, and that the hospital was entitled to the whole of the residue. The Court considered that section 24 of the Wills Act took effect, and that the principle laid down in *Jones* v. *Ogle* and *Re March* does not apply to a general devise or bequest where the testator's testamentary power is increased between the date of his will and that of his death.

Change in death duties.

In *Re Rayer* (*u*), a testator, by his will made in 1882, bequeathed certain annuities charged on land, and directed that they should be paid without any deduction except for legacy duty and income tax. By the Customs, etc., Act, 1888, legacy duty was abolished in respect of annuities charged on the real estate of any person dying after July 1, 1888, and succession duty was substituted. The testator afterwards made a codicil by which he confirmed his will, and died in 1892. It was held by Farwell, J., that the testator by republishing his will intended it to take effect subject to the alteration in the law, and that the annuitants were liable to succession duty.

(*u*) [1903] 1 Ch. 685. As to death duties, see Chap. XLVI.

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DOCTRINE OF LAPSE.

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General principle respecting lapse.

I.—General Principles.—" The liability of a testamentary gift to failure, by reason of the decease of its object in the testator's lifetime, is," says Mr. Jarman (*a*), " a necessary consequence of the ambulatory nature of wills; which not taking effect until the death of the testator, can communicate no benefit to persons who previously die : in like manner as a deed cannot operate in favour of those who are dead at the time of its execution."

No lapse where gift is made in discharge of moral obligation.

There is, indeed, an anomalous class of cases constituting an exception to the general rule of lapse; they are said to depend on the mixed principle of bounty and obligation (*b*), namely, that where the intention of a testator in giving a legacy is not merely bounty to the legatee, but the discharge of an obligation recognised by the testator, although not legally enforceable, the legacy does not lapse by the death of the legatee in the testator's lifetime. Thus, if the testator makes a bequest for the payment of a debt which is barred by the Statute of Limitations (*c*), or by the bankruptcy law (*d*), the bequest takes effect, notwithstanding the death of the creditor in the testator's lifetime. So if a

(*a*) First edition, p. 293. The term " lapse " is generally applied to failure by the death of the devisee or legatee in the testator's lifetime, but it is sometimes used in a wider sense, as for instance in the case of the failure of a contingent gift by reason of the event not taking place : *Smell* v. *Dee*, 2 Salk. 415; *Re Parker*, [1901] 1 Ch. 408. So where there was a gift of consumable articles to A for life, or so long as she should remain unmarried (equivalent to an absolute gift), it was held that the marriage of A in the testator's lifetime caused a result similar to that of her death in his lifetime : *Andrew* v. *Andrew*, 1 Coll. 690. " Lapse " is not used to signify the failure of a testamentary gift by reason of its illegality : see *Champney* v. *Davy*, 11 Ch. D. 949. But it is sometimes used by testators in the sense of being revoked : thus in *Re Wand*, [1907] 1 Ch. 391, the testator directed that if a certain event happened in his lifetime the share given to a legatee should lapse and form part of the residue.

(*b*) *Philips* v. *Philips*, 3 Ha., at p. 300.

(*c*) *Williamson* v. *Naylor*, 3 Y. & C. 208. Compare the rule that an executor may pay or retain a statute-barred debt, referred to in Chaps. LIII and LIV.

(*d*) *Philips* v. *Philips*, 3 Ha. 281; *Re Sowerby's Trust*, 2 K. & J. 630. The bequest is liable to legacy duty; *Turner* v. *Martin*, 7 D. M. & G. 429.

married woman makes a bequest or appointment for the purpose of discharging a moral obligation, there is no lapse by the death of the legatee in her lifetime (*e*). It is different where the debt has been released (*f*).

Provisions of Wills Act.

The exceptions to the doctrine of lapse introduced by the Wills Act are considered in a later part of this chapter.

Effect of lapse.

The effect of lapse, beyond the mere failure of the gift itself, is considered in connection with residuary devises and bequests (*g*).

Lapse not prevented by words of limitation: —real estate;

Mr. Jarman continues (*h*): "The doctrine applies indiscriminately to gifts with and gifts without words of limitation. Thus, if a devise be made to A and his heirs, or (unless the will be regulated by the new law (*i*)) to A and the heirs of his body, and A die in the lifetime of the testator, the devise absolutely lapses, and the heir, special or general (as the case may be), of A takes no interest in the property, he being included merely in the words of limitation, *i.e.*, in the terms which are used to denote the quantity or duration of the estate to be taken by the devisee, through whom alone any interest can flow to such heir (*k*).

—personalty.

"Bequests of personal property, of course, are subject to the same rule (*l*); and it is observable that, in applying it to such bequests, a legacy to one and his executors or administrators is construed as a mere absolute gift (*m*); for the circumstance that,

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(*e*) *Stevens* v. *King*, [1904] 2 Ch. 30.

(*f*) *Coppin* v. *Coppin*, 2 P. W. 295. As to the effect of a bequest to a creditor of a statute-barred debt, see *post*, p. 1085. As to the effect of a covenant not to sue, see *Golds* v. *Greenfield*, 2 Sm. & G. 476.

(*g*) *Post*, Chaps. XXV and XXIX.

(*h*) First edition, p. 293.

(*i*) Mr. Jarman is referring to the Wills Act, 1837.

(*k*) *Brett* v. *Rigden*, Plow. 345; *Fuller* v. *Fuller*, Cro. El. 422; *Wynn* v. *Wynn*, 3 Br. P. C. Toml. 95; *Hutton* v. *Simpson*, 2 Vern. 722; see also *Goodright* v. *Wright*, 1 P. W. 397; *Ambrose* v. *Hodgson*, 3 Br. P. C. Toml. 416. The reader will remember that at the time when Mr. Jarman wrote, most wills were regulated by the old law, under which words of limitation (or equivalent expressions) were required to pass an estate of inheritance in real property.

(*l*) A gift of a sum of money for purchase of an annuity may be the subject of lapse, *Re Draper's Trust*, 58 L. T. 942.

Effect of death of debtor upon clause forgiving debts.

(*m*) *Stone* v. *Evans*, 2 Atk. 86; *Elliott* v. *Davenport*, 1 P. W. 83, 2 Vern. 521, "where the legacy was of a debt, which," as Mr. Jarman remarks, "is liable to lapse equally with gifts in any other form (*Toplis* v. *Baker*, 2 Cox, 118). It is true that in *Sibthorpe* v. *Moxton* (or *Moxom*), 1 Ves. 49; 3 Atk. 580, Lord Hardwicke held that the forgiving of a debt, coupled with a general direction to the executor to deliver up the security (without saying to whom), operated as a release, though the legatee died in the testator's lifetime; his lordship thinking that the latter words imported that the security should be delivered up, whether the debtor were living or not, and which he considered would, beyond all question, be the effect of the words of direction standing alone; though he admitted that, in regard to the administration of assets, it was to be considered as a legacy. In *Maitland* v. *Adair*, 3 Ves. 231, the words were, 'I return A his bond.' A died in the testator's lifetime, and it was held that the legacy lapsed. This case is overlooked by Mr. Roper (Treat. Leg. 411), who lays more stress on the merely verbal distinction

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in regard to personalty, words of limitation are not requisite to carry the absolute interest, has been considered as insufficient to denote an intention to make the executors or administrators substituted and independent objects of gift. And where the devisee or legatee happens to be dead when the will is made, the words of limitation are equally inoperative to let in the representatives of the deceased person (*n*).

Effect of declaration that legacy shall not lapse.

"And even a declaration that the devise or bequest shall not lapse, does not *per se* prevent it from failing by the death of the object in the testator's lifetime, since negative words do not amount to a gift; and the only mode of excluding the title of whomsoever the law, in the absence of disposition, constitutes the successor to the property, is to give it to some one else (*o*). A declaration to this effect, however, following a bequest to a person and his executors or administrators, would be considered as indicating an intention to substitute the executors or administrators, in the event of the gift to the original legatee failing by lapse (*p*)."

A declaration by a testator that if a legatee shall predecease the testator leaving issue living at the testator's death the share shall not lapse but shall take effect as if the legatee had died immediately after the testator, is sufficient to make the legacy pass to the legatee's personal representatives as part of his personal estate (*q*).

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between the giving and forgiving of a debt than seems warranted by the principles of the cases" (note in 1st ed. p. 294). In *Izon* v. *Butler*, 2 Price 34, the words were, "I remit and forgive, etc., and I direct the bond to be delivered up," and it was held that the legacy lapsed by the death of the debtor in the testator's lifetime. Thomson, C.B., said he had always been at a loss to understand the distinction between giving and forgiving. In *South* v. *Williams*, 12 Sim. 566, where the testator directed a balance of debts due from A, and property bequeathed to A's wife to be struck, and the surplus to be paid to or secured by the legatee, Sir L. Shadwell thought A was released from the debts, though his wife died in the lifetime of the testator; compare *Davis* v. *Elmes*, 1 Bea. 131.

(*n*) *Maybank* v. *Brooks*, 1 Br. C. C. 84 (where the question arose whether evidence of the testator's knowledge of the death of the legatee was admissible, *post*, Chap. XV); and a confirmation of a will by codicil will not prevent lapse where the legatee has died between the dates of the will and codicil, although the legacy was given to the legatee, her executors, etc., *Hutcheson* v. *Hammond*, 3 B. C. C. 128.

(*o*) See *Re Greenwood*, [1912] 1 Ch. 392, at p. 396; *post*, p. 682. So a direction that the heir at law shall not take the proceeds of sale of land in a case of lapse, is ineffectual: *Fitch* v. *Weber*, 6 Ha. 145; *post*, p. 752.

(*p*) *Sibley* v. *Cook*, 3 Atk. 572. In *Re Wilder's Trusts*, 27 Bea. 418, there were express words of substitution. But a declaration that a legacy shall vest in the legatee immediately upon execution of the will, following a gift to one, his executors, administrators and assigns, will not prevent lapse, *Browne* v. *Hope*, L. R., 14 Eq. 343.

(*q*) *Re Greenwood*, [1912] 1 Ch. 393 (following *Re Clunies-Ross*, [1912] W. N. 33, distinguishing *Re Gresley's Settlement*, [1911] 1 Ch. 358, and *Re Scott*, [1901] 1 K. B. 228); *Re Morris*, 115 L. T. 915. *Re Smith*, [1916] 2 Ch. 368.

Cases of substitution.

Where the bequest is to A, and, "in case of his death, to his executors or administrators," or "to his legal personal representatives," there can, of course, be no doubt that the gift does not fail (*r*); the only question then is, who are the persons to take beneficially, a point which will be treated of hereafter. But where there was a direction to pay legacies within six months, and a gift to the children of the legatee, in case of the legatee's death "not having received his legacy," it was held, nevertheless, that the legacy lapsed by his death in the testator's lifetime (*s*). And if property is given to A for life and then to B, or in the event of his death to his executors or administrators, this is taken to mean death during A's life interest, so that if B predeceases the testator the gift lapses (*t*).

Re Valdez's Trusts.

In *Re Valdez's Trusts* (*u*), a share of residue was given to A, and in case of her death, to her executors or administrators; A died in the testator's lifetime, having bequeathed the residue of her property to the testator himself; it was held that the interest given by the testator's will to the legatee, and in case of her death to her representatives, was not disposed of by his will.

Maxwell v. *Maxwell.*

In *Maxwell* v. *Maxwell* (*x*) a testator made a bequest to "my younger sons or their executors"; at the date of the will A, one of his younger sons, was dead: it was held that A's share did not lapse, but went to his administratrix. This construction, however, turned on the fact that the testator had many years before by deed appointed a fund in favour of his younger sons, including A, who was then living, and that by his will he directed the fund to be paid "to my younger sons or their executors," "according to my appointment."

If property is bequeathed to A for life and after his death to B or his executors, administrators, or assigns, this merely means that the gift is to vest in B at the testator's death, so that if B predeceases the testator the bequest lapses (*y*).

The question whether a gift to "A or his heirs," or to "A or his issue," or the like, is a substitutional gift, or whether the

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(*r*) *Long* v. *Watkinson*, 17 Bea. 471; *Hinchliffe* v. *Westwood*, 2 De G. & S. 216; *Hewitson* v. *Todhunter*, 22 L. J. Ch. 76, *Re Seymour's Trusts*, John, 472; *Re Clay*, 54 L. J. Ch. 648, cited *post*, p. 1588. See *Maxwell* v. *Maxwell*, Ir. R., 2 Eq. 478, *supra*, where the question arose whether substitution took place in the case of a person who was dead at the date of the will.

(*s*) *Smith* v. *Oliver*, 11 Bea. 494 (as to this case see *Re Green's Estate*, 1 Dr. & Sm. 73); *Tidwell* v. *Ariel*, 3 Madd. 403; *Re Porter's Trust*, 4 K. & J. 195.

(*t*) *Corbyn* v. *French*, 4 Ves. 418; *Bone* v. *Cooke*, M'Cl. 168; see Chap. XXXVI and pp. 2092 *seq.*

(*u*) 40 Ch. D. 159.

(*x*) Ir. R., 2 Eq. 478.

(*y*) *Leach* v. *Leach*, 35 Bea. 185; *Re Hopkins' Trusts*, 2 H. & M. 411; *Re Masterson*, [1902] W. N. 192 ("heirs or assigns").

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word " or " should be construed " and," is discussed in another chapter (z).

Beneficial gift by way of substitution.

If the gift is to A for life and then to B or in case of his death to his children, or next-of-kin, or the like, then the gift to the children, etc., takes effect, although B dies in the lifetime of the testator (a).

Settled shares of residue.

When a share of residue is settled upon a person for life with remainder to other persons, and the original legatee dies in the lifetime of the testator, the question often arises whether the bequest lapses, or whether it takes effect for the benefit of the remaindermen. In *Stewart* v. *Jones* (b), the testator gave his residuary estate upon trust for such of his children as should attain twenty-one or being daughters should attain that age or marry, and went on to direct that " the share to which each of my daughters on attaining twenty-one or marrying shall become entitled under the trusts aforesaid " should be held upon trust for her for life with remainder to her children : it was held that the children of a daughter who predeceased the testator took nothing.

Re Roberts.

This decision was disapproved by Malins, V.-C., in *Re Speakman* (c), but its principle was carried even further by the Court of Appeal in *Re Roberts* (d). There the testator bequeathed his residuary estate upon trust for a nephew and three nieces by name in equal shares, with a clause of accruer to take effect on the death of any of them under twenty-one, and a proviso that the share of each niece should be held upon trust for her for life, and after her death upon such trusts as she should appoint, and in default of appointment upon trust for her children, and failing children for her statutory next-of-kin. One of the nieces predeceased the testator, leaving a child who survived him. It was held that her share lapsed. But in *Re Pinhorne* (e), the testator gave his residuary estate upon trust for his four sisters by name in equal shares, subject to a proviso that the share of each should be held upon trust for her for life, with power to appoint a life interest to a husband, and after her death for her children at twenty-one or marriage. One of the sisters predeceased the testator, leaving infant children, and it was held by Chitty, J., that her share had not lapsed, and

Re Pinhorne.

(z) Chap. XXXVI, *post*, pp. 1286 *seq.*

(a) *Re Porter's Trust*, 4 K. & J. 188, discussed more in detail in Chap. XXXVI, pp. 1288, 1295.

(b) 3 De G. & J. 532. See *Wordsworth* v. *Wood*, 4 Myl. & C. 641. The cases of *Rheeder* v. *Ower*, 3 Br. C. C. 240, and *Varley* v. *Winn*, 2 K. & J. 700, are cited *post*, p. 2090.

(c) 4 Ch. D. 620.

(d) 27 Ch. D. 346; 30 Ch. D. 234.

(e) [1894] 2 Ch. 276.

that the children were entitled to it contingently on attaining twenty-one or marrying. Chitty, J., pointed out that in *Stewart* v. *Jones*, the gift being to a class, there was no question of lapse (*f*), and that no one could take a share as a member of the class unless he or she survived the testator, while in *Re Roberts* the clause of accruer made it impossible to say that any niece took a fixed share of the residue. In *Re Powell* (*g*), Cozens-Hardy, J., followed *Re Pinhorne*, and these cases were approved by the Court of Appeal in *Re Walter* (*gg*).

Contingent gifts.

If a legacy is given to A with a gift over to B, on the death of A in certain circumstances, and A dies in those circumstances during the testator's lifetime, the legacy does not lapse : as where the legacy is to go over to B, on the death of A under twenty-one, and A dies under that age during the testator's lifetime (*h*). Nor does the fact that the legatee is a married woman, and that the gift over is to her next-of-kin, exclusive of her husband, afford any presumption that it was only intended to take effect in the event of her surviving the testator (*i*). But if it becomes impossible for the gift over to take effect, and then A dies during the lifetime of the testator, the legacy lapses : as where a legacy is given to A and if he dies before completing his apprenticeship, then to B, and A dies during the lifetime of the testator after completing his apprenticeship, the legacy lapses (*j*).

Acceleration by lapse of prior limitations.

The effect of lapse in accelerating subsequent limitations is considered elsewhere (*k*).

Culsha v. *Cheese.*

In *Culsha* v. *Cheese* (*l*), A devised Blackacre to uses and upon trusts under which B had a certain share and interest, and C, D, and E took the residue. B by will devised Whiteacre "to and upon the uses, trusts, &c., in and by A's will expressed, declared, and contained of and concerning the same." C, D, and E all died in the lifetime of B : it was held by Wigram, V.-C., on the authority of *Youde* v. *Jones* (*m*), that as the will of A declared no uses of Whiteacre, the devise contained in B's will failed; this being the real ground of the decision, the Vice-Chancellor

(*f*) Section II, *post*, p. 406.

(*g*) [1900] 2 Ch. 525. Both these decisions were referred to in the Court of Appeal in *Re Whitmore*, [1902] 2 Ch. 66, without disapproval : the last case is cited *post*, p. 2092.

(*gg*) 56 Sol. J. 632.

(*h*) *Darrel* v. *Molesworth*, 2 Vern. 378; *Willing* v. *Baine*, 3 P. W. 115; *Humphreys* v. *Howes*, 1 R. & M. 639; *Re Green's Estate*, 1 Dr. & Sm. 68; *Rackham* v. *De la Mare*, 2 D. J. & S. 74; and other cases cited *post*, p. 2090.

(*i*) *Hardwick* v. *Thurston*, 4 Russ. 380; *Nichols* v. *Haviland*, 1 K. & J. 504, and other cases cited *post*, p. 2094.

(*j*) *Humberstone* v. *Stanton*, 1 V. & B. 385; *Doo* v. *Brabant*, 3 Br. C. C. 393; 4 T. R. 706; *Williams* v. *Jones*, 1 Russ. 517.

(*k*) *Post*, p. 427.

(*l*) 7 Ha. 236; *Re Currie's Settlement*, [1910] 1 Ch. 329.

(*m*) 14 Sim. 131.

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remarked: "It was therefore gratuitously, though not extra-judicially, that in the course of the argument I said that the wife's will must speak from her own death, and that no person who did not survive her could take under her will, even if the trusts of her will could be found in that of her husband." The case is, however, commonly cited as an authority on the question of lapse.

Re Bosanquet.

In *Re Bosanquet* (*n*), the testatrix gave to the personal representatives of her sister a sum to go as part of the sister's personal estate. The sister made her will many years before and died shortly after the will of the testatrix, leaving an insufficient estate to pay in full a trust legacy to A for life and then to B, who died before the testatrix. Held, that B's interest lapsed, but that the legatees of the sister would have to be paid in full before the residuary legatee of the sister got anything out of the estate of the testatrix.

In *Colgan* v. *MacDonnell* (*o*) the testatrix bequeathed to A "A charge which I have on his property of D, and which I now cancel." A predeceased the testatrix. Held, that the bequest lapsed.

Lapse of power.

A power created by will lapses by the death of the donee before the donor (*p*).

The question whether, if a power of appointment among a number of named persons is created by will, and one of them predeceases the testator, the power is defeated *pro tanto*, is discussed elsewhere (*q*).

Gift over in default of appointment.

A gift over in default of appointment does not lapse by the death of the donee of the power in the testator's lifetime (*r*).

Lapse of appointment.

The doctrine of lapse applies to testamentary appointments under powers, and consequently if the appointee is not living at the decease of the donee of the power, the appointment will not take effect (*s*). And if no appointment is made, and there is no gift over in default of appointment, only the objects who survive the donee will be capable of taking by implication (*t*). A testa-

(*n*) 85 L. J. Ch. 14; 113 L. T. 152; following *Long* v. *Atkinson*, 17 Bea. 471.

(*o*) [1927] N. Ir. 213.

(*p*) *Jones* v. *Southall*, 32 Bea. 31; *Sharpe* v. *M'Call*, [1903] 1 Ir. 179; *Re Young*, [1920] 2 Ch. 427.

(*q*) *Post*, p. 1799, in connection with the case of *Reade* v. *Reade*, 5 Ves. 744.

(*r*) *Nichols* v. *Haviland*, 1 K. & J. 504, following *Edwards* v. *Saloway*, 2 Ph. 625. See *Hardwick* v. *Thurston*, 4 Russ. 380; *Kellett* v. *Kellett*, Ir. R. 5 Eq. 298.

(*s*) *Kennedy* v. *Kingston*, 2 J. & W. 431; *Reid* v. *Reid*, 25 Bea. 469; *Freeland* v. *Pearson*, L. R. 3 Eq. 658. It is hardly necessary to say that a power to appoint to A does not authorise an appointment to his executors, etc., in the event of his predeceasing the donee: *Re Susanni's Trusts*, 47 L. J. Ch. 65.

(*t*) *Walsh* v. *Wallinger*, 2 R. & Myl. 78; see *post*, p. 630.

mentary appointment in pursuance of a covenant to settle contained in marriage articles is not exempt from the operation of the doctrine (*u*). Where the fund is insufficient for all the particular gifts, and one of them lapses, the lapsed gift goes to augment the gifts to the other appointees and to prevent abatement (*x*).

Lapse prevented by survivorship among joint tenants.

Where there is a devise or bequest to a plurality of persons who take as joint tenants (*y*) no lapse can occur unless all the objects die in the testator's lifetime; because as joint tenants take *per my et per tout*, or, as it has been expressed, "each is a taker of the whole but not wholly and solely" (*z*), any one of them existing when the will takes effect will be entitled to the entire property. Thus, if real estate be devised to A and B, or personal property be bequeathed to A and B, and A die in the testator's lifetime, B, in the event of his surviving the testator, will take the whole (*a*). And the same consequence would ensue if the gift failed from any other cause (*b*).

Not in the case of tenants in common.

It is equally clear that if the devisees or legatees in any of these cases had been made tenants in common, the failure of the gift as to one object would not have entitled the other to the whole by the mere effect of survivorship (*c*).

Gift to persons as tenants in common, with benefit of survivorship—

or as a class.

But property may be given to several persons as tenants in common with benefit of survivorship, and then if the gift to one of them is revoked or otherwise fails, the whole goes to the others (*d*). Again, property can be given to a number of persons *nominatim*, as tenants in common, subject to a condition that they shall be living at a given time, and if any of them are not living at that time, the others take the whole. In *Sanders* v. *Ashford* (*e*), the time was the testator's death : in *Re Hornby* (*f*),

(*u*) *Re Brookman's Trust*, L. R. 5 Ch. 182; see *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18.

(*x*) *Eales* v. *Drake*, 1 Ch. D. 217. The doctrine of lapse in connection with powers is referred to also *post*, p. 818.

(*y*) As to the words which will create a joint tenancy, see Chap. XLIV.

(*z*) Cart. 4; Litt. s. 288.

(*a*) *Davies* v. *Kemp*, Cart. 4, 5, Eq. Ca. Ab. 216, pl. 7; *Buffar* v. *Bradford*, 2 Atk. 220; *Morley* v. *Bird*, 3 Ves. 629.

(*b*) *Humphrey* v. *Tayleur*, Amb. 136; *Larkins* v. *Larkins*, 3 B. & P. 16; *Short* d. *Gastrell* v. *Smith*, 4 East, 419; *Cresswell* v. *Cheslyn*, 2 Ed. 123; *Ramsay* v. *Shelmerdine*, L. R. 1 Eq. 129 (all cases of revocation) : and *Young* v. *Davies*, 2 Dr. & Sm. 167, where one joint-tenant was an attesting witness. But in *Re Kerr's Trust*, 4 Ch. D. 600, on an appointment to A, an object of the power, and B, a stranger, Jessel, M.R., refused to apply "the rule of tenure applicable to real estate," and held that A took one-half only.

(*c*) *Page* v. *Page*, 2 P. W. 489; *Peat* v. *Chapman*, 1 Ves. sen. 542; *Sykes* v. *Sykes*, L. R. 4 Eq. 200; *Re Wood's Will*, 29 Bea. 236. In the last case the testatrix, by codicil made after the death of one of the residuary legatees, confirmed her will "except as to any legacies lapsed."

(*d*) *Re Radcliffe*, 51 W. R. 409.

(*e*) 28 Bea. 609. Compare *Re Chaplin's Trust*, 33 L. J. Ch. 183, cited, *ante*, p. 310, note, and *post*, p. 409.

(*f*) 7 W. R. 729.

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the time was the date of the will (*g*). A gift of this description is really a gift to a class (*h*).

Re Whiston.

In *Re Whiston* (*i*), the testator, who had been twice married, made a general bequest of his residuary real and personal estate (except what belonged to his late wife) to trustees upon trust to sell and divide the proceeds amongst his six named children in equal shares, with a direction that the share to which his children should be entitled under his will should be vested in them at his decease. He then directed his trustees to divide the personal estate of his late wife to which he had become entitled at her death intestate amongst the three named children by her. One of these, P, was dead at the date of the will. Held, first that P's one-third share in the specific property lapsed and fell into residue, and secondly that the one-sixth share of P in the residue was undisposed of and passed as to realty to the testator's heir, and as to personalty to his next-of-kin.

Evidence of survivorship.

To enable a person to take under a will it must be proved affirmatively that he survived the testator. Consequently if a testator and legatee perish by the same calamity, and there is no evidence that the legatee survived the testator, the bequest lapses (*k*). And if a legatee has not been heard of since the testator's death, so that it cannot be proved that he survived the testator, his representatives cannot claim the legacy (*l*).

Gifts to charity.

If a testator gives a legacy to a charitable institution which has ceased to exist before his death, the legacy lapses, unless the testator expresses an intention to give it to charitable purposes independently of the existence of the particular institution (*n*).

Doctrine in reference to gifts to classes.

II.—Gifts to a Class.—Where the devise or bequest embraces a fluctuating class of persons, who, by the rules of construction, are to be ascertained at the death of the testator, or at a subsequent period, the decease of any of such persons during the testator's life will occasion no lapse or hiatus in the disposi-

(*g*) In *Clarke* v. *Clemmans*, 36 L. J. Ch. 171, where a testator bequeathed residue to A and others *nominatim* as tenants in common, but A was already dead (as the testator showed he knew), Malins, V.-C., held that the others were entitled to the whole fund: *sed qu.* See also *Re Spiller*, 18 Ch. D. 614. In *Re Sharp*, [1908] 1 Ch. 372, Joyce, J., referred to *Clarke* v. *Clemmans* as a binding authority, but it does not seem to have any bearing on that case. See [1908] 2 Ch. 190.

(*h*) See *Re Dunster*, [1909] 1 Ch. 103, *post*, p. 408.

(*i*) [1924] 1 Ch. 122. *Re Featherstone's Trusts*, 22 Ch. D. 111, applies only to the facts of that particular case and is no authority in any other case.

(*k*) *Barnett* v. *Tugwell*, 31 Bea. 232; but now see section 184 of the Law of Property Act, 1925.

(*l*) *Re Walker*, L. R. 7 Ch. 120; *Re Benjamin*, [1902] 1 Ch. 723.

(*n*) *Clark* v. *Taylor*, 1 Drew. 642; *Fisk* v. *Att.-Gen.*, L. R. 4 Eq. 521; *Re Ovey*, 29 Ch. D. 560; *Re Rymer*, [1895] 1 Ch. 19; *Re Davis*, [1902] 1 Ch. 876. *Ante*, pp. 229 *seq.*

tion, even though the devisees or legatees are made tenants in common, since members of the class antecedently dying are not actual objects of gift. Thus, if property be given simply to the children, or to the brothers or sisters of A, equally to be divided between them, the entire subject of gifts will vest in any one child, brother or sister, or any larger number of these objects surviving the testator, without regard to previous deaths (*o*); and the rule is the same where the gift is to the children of a person actually dead at the date of the will, or to the present born children of a person, in either of which cases, it is to be observed, there is this peculiarity, that the class is susceptible of fluctuation only by diminution, and not by increase; the possibility of any addition by future births being in the former case precluded by the death of the parent, and in the latter by the express words (*p*). So if the gift is to such of the testator's children as shall be living at the death of A, and A dies in the testator's lifetime, this is a gift to a class; consequently the share of a child who survives A and dies in the testator's lifetime does not lapse, and the children who survive the testator take the whole (*q*). Again, if one who would otherwise be a member of the class is incapable of taking by reason of his being an attesting witness (*r*), or by reason of the gift to him being revoked (*s*), the whole property goes to those members who are capable of taking (*t*).

Mistaken use of word "lapse" by testator.

If, after a gift to children as a class, the testator directs that in case any child dies before him leaving issue, the share of that child shall not "lapse," but go to his executors, this does not cause the share of a child who dies before the testator, without issue, to lapse (*u*).

Gift to persons designated by name or number;

A gift to several named persons is not a gift to a class unless words of contingency are added; as where the gift is to A, B, C, and D, "if living" (*x*). And a gift to several named persons, without more, is not a gift to a class, even if they stand in a

(*o*) *Doe* d. *Stewart* v. *Sheffield*, 13 East, 526; *Shuttleworth* v. *Greaves*, 4 Myl. & Cr. 35; and compare *Cort* v. *Winder*, 1 Coll. 320; *M'Kay* v. *M'Kay*, [1900] 1 Ir. R. 213.

(*p*) *Viner* v. *Francis*, 2 Br. C. C. 658, 5 Cox, 190; *Lee* v. *Pain*, 4 Hare, 254; *Leigh* v. *Leigh*, 17 Bea. 605; *Dimond* v. *Bostock*, L. R. 10 Ch. 358. This point is referred to *post*, p. 412.

(*q*) *Cruse* v. *Howell*, 4 Dr. 215. This point is further discussed, *post*, p. 412.

(*r*) *Fell* v. *Biddolph*, L. R. 10 C. P. 709; *Young* v. *Davies*, 2 Dr. & Sm. 167.

(*s*) *Shaw* v. *M'Mahon*, 4 D. & War. 431; *Clarke* v. *Phillips*, 17 Jur. 886; *M'Kay* v. *M'Kay*, [1900] 1 Ir. R. 213; *Re Dunster*, [1909] 1 Ch. 103.

(*t*) The rule is thus stated by Jessel, M.R., in *Re Coleman and Jarrom*, 4 Ch. D. 165, *post*, p. 409.

(*u*) *Aspinall* v. *Duckworth*, 35 Bea. 307. For another example of the erroneous use of the word "lapse" see *Re Wand*, [1907] 1 Ch. 391.

(*x*) *Re Hornby*, 7 W. R. 729; *Sanders* v. *Ashford*, 28 Bea. 609; *Re Spiller*, 18 Ch. D. 614.

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common relationship to the testator, as where the gift is "to my sons A and B, and my daughter C" (*y*). And if a testator after a gift to "children," proceeds to name them (*z*), or if he specifies their number, as by giving "to the five children of A" (*a*), this is a *designatio personarum*, and is a bequest to those who are named, or to the five in existence at the date of the will, and the shares of any who die before the testator lapse. So, where the bequest was to the testator's brother and sister and his wife's brothers and sister, the testator and his wife each having one sister at the date of the will (*b*), and in another case even where the bequest was to E., the eldest son of J. S. and the other children of J. S., he having three other children at the date of the will, it was held that the terms "children," "brothers," etc., were to be understood to mean those living at the date of the will as *personæ designatæ* (*c*). In *Ramsay* v. *Shelmerdine* (*d*), where a testator directed his residue to be divided into as many shares as should be equal in number to the number of his children living at his decease, or such of them as should die in his lifetime leaving issue, and (in effect) gave one share to or in trust for each child: it was held that this was not a gift to a class. The decision appears to be erroneous: it was not followed in *Re Dunster* (*e*), where the terms of the will were practically identical with those in *Ramsay v. Shelmerdine.*

or in separate shares.

Where some members of class are included by name,

But the fact that some of the children are mentioned by name does not prevent the gift from being a gift to a class. Thus a gift to "all my children, including B. and W." (*f*), or a gift "to my son George, my daughter Lydia, etc., and such of my children hereafter to be born as shall attain twenty-one" (*g*), is a gift to a class (*h*).

or excepted by name.

So a gift to "all my children born and to be born, except my son Thomas," is a gift to a class (*i*).

Gift to a class and to an individual not a member of the class.

The question whether a gift "to A and all the children of B" (assuming that A is not a child of B) is a class gift, is referred

(*y*) *Cresswell* v. *Cheslyn*, 2 Ed. 123.

(*z*) *Bain* v. *Lescher*, 11 Sim. 397; *Burrell* v. *Baskerfield*, 11 Bea. 525; *Re Hull's Estate*, 21 Bea. 314; *Spencer* v. *Wilson*, L. R. 16 Eq. 501; *Re Bentley*, 110 L. T. 623 (nephews and nieces).

(*a*) *Re Smith's Trusts*, 9 Ch. D. 117; *Jacob* v. *Catling*, [1881] W. N. 105.

(*b*) *Havergal* v. *Harrison*, 7 Bea. 49; and see *Hall* v. *Robertson*, 4 D. M. & G. 781; *Re Gibson's Trusts*, 2 J. & H. 656, and other cases cited *post*, p. 413.

(*c*) *Leach* v. *Leach*, 2 Y. & C. C. C. 495.

(*d*) L. R. 1 Eq. 129.

(*e*) [1909] 1 Ch. 103.

(*f*) *Shaw* v. *M'Mahon*, 4 Dr. & W. 431.

(*g*) *Re Jackson*, 25 Ch. D. 162, following *Re Stanhope's Trusts*, 27 Bea. 201.

(*h*) *Shaw* v. *M'Mahon*, 4 Dr. & W. 431.

(*i*) *Re Jackson, supra*, where the testator specified all his living children, other than Thomas, by name, and this was held equivalent to an express exception of Thomas.

to in the judgment of Lord Davey in *Kingsbury* v. *Walter*, to be presently quoted (*k*).

Whether deceased child can be included in class gift.

If a testator gives property to all his children living at his decease and any children who may die in his lifetime leaving issue living at his death, this operates under section 33 of the Wills Act, so that the share of a child dying before the testator and leaving issue, forms part of that child's estate (*l*). But as section 33 only applies to gifts to the testator's own issue, a gift to the children of another person who die in the testator's lifetime leaving issue is nugatory; those children who survive the testator take as a class under the gift, and the issue of a deceased child take nothing by implication (*m*).

What is a class?

The question what constitutes a class has been already considered in connection with the Rule against Perpetuities (*n*). The question also arises in connection with the doctrine of lapse, and was much discussed in the case of *Kingsbury* v. *Walter* (*o*). There the testator appointed his wife and his "niece A" executrixes, and gave certain property upon trust for his wife for life, and after her death "upon trust for the said A and the child or children of my sister B who shall attain the age of twenty-one years" in equal shares. A was at the date of the will nearly twenty-one; she attained twenty-one and died before the testator. At the death of the wife all B's children had attained twenty-one. It was held by the Court of Appeal and by the House of Lords, that the testator intended to make one class of nephews and nieces, and that consequently there was no lapse by reason of A's death, the other nephews and nieces taking the whole. Lord Davey in his speech referred to some of the earlier decisions (*p*), and said: "*Prima facie* a class gift is a gift to a class consisting of persons who are included and comprehended under some general description, and bear a certain relation to the testator (*q*). . . . But it may be none the less

Kingsbury v. *Walter*.

Lord Davey's description of a class gift.

(*k*) *Infra*.

(*l*) See 2 Key & Elph. Conv. (9th ed.) 828, note.

(*m*) *Re Coleman and Jarrom*, 4 Ch. D. 165. But by apt words issue (if any), may of course be substituted to take the share of a deceased parent without destroying the nature of the class gift. See an instance, *Aspinall* v. *Duckworth*, 35 Bea. 307.

(*n*) *Ante*, pp. 300 *seq*.

(*o*) [1901] A. C. 187. *S.C. sub nom. Re Moss*, [1899] 2 Ch. 314; *Re Scorer*, 132 L. T. 529.

(*p*) *Pearks* v. *Moseley*, 5 A. C. 714; *Re Chaplin's Trust*, 33 L. J. Ch. 183; *Re Allen*, 44 L. T. 240.

(*q*) Or to some other person (*Re Featherstone's Trusts*, 22 Ch. D., at p. 121). A class is a number of persons "comprised under one general description, indefinite in number, and individually undistinguished by name or particular designation": *per* Lord Langdale, M.R., in *Burrell* v. *Baskerfield*, 11 Bea. p. 534. To a certain extent, therefore, the question whether a gift is a class gift is a question of form. Thus if a testator gives property to a number of persons by some general description, he is presumed to mean such of them as survive him, even if the description can only include persons living, and

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a class because some of the individuals of the class are named. . . . *Stanhope's Case* (*r*) is an example; there the gift was to four named daughters and all his after-born daughters, and that was rightly, as I think, held to be a class gift. To the same effect is a case before Chitty, J., *Re Jackson* (*s*), where the gift was to five named individuals and all his other sons and daughters who should be born afterwards and attain the age of twenty-one years. Chitty, J., held that that was a class gift, although the condition of attaining the age of twenty-one years was imposed upon the other children and not upon those who were named. He came to this conclusion upon the ground that it appeared from the evidence that those who were named had already attained the age of twenty-one years. . . . There may also be a composite class, such as, for instance, children of A and children of B: that would be a good class (*t*). On the other hand, a gift to A and all the children of B is, in my opinion, *prima facie* not a class gift, and I think that has been so decided, and rightly decided, in the case of *Re Chaplin's Trusts* (*u*), which I have already referred to, and also in a case before Sir George Jessel of *Re Allen*; *Wilson* v. *Atter* (*x*). . . . But it is perfectly plain that a gift in the form which I have mentioned may be a class gift, if there is to be found in the will a context which will show that the testator intended it to be a class gift. I think the same result may be arrived at if the Court, putting itself in the same position as the testator occupied, with the same knowledge as the testator had when he was writing his will, comes to the conclusion that the gift, although expressed in the form of a gift to an individual and the children of A, was intended to operate as a class gift. There is abundant authority for that proposition. . . . The case of *Aspinall* v. *Duckworth* (*y*) appears to me to be exactly this case. It was a gift unto and equally amongst the testator's nephew A and the children of his sister B, as tenants in common. Lord Romilly held that that was a gift to a class. It differs from this case only in one particular, namely, that the gift here is confined to those children who attain twenty-one.

Composite class.

Gift to A and the children of B not a class gift,

unless shown to be so by context or circumstances.

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therefore capable of being designated, at the date of the will. Thus in *Viner* v. *Francis*, 2 Br. C. C. 658, a testator gave property to "the children of my late sister, M. C., to be equally divided among them": it was held that this meant the children of M. C. living at the testator's death; in other words, it was a gift to a class; *Shuttleworth* v. *Greaves*, 4 My. & Cr. 35; *Dimond* v. *Bostock*, L. R. 10 Ch. 358, and other cases cited *post*, p. 412.

(*r*) 27 Bea. 201.

(*s*) 25 Ch. D. 162. Followed in *Re Mervin*, [1891] 3 Ch. 197.

(*t*) For another example of a composite class, see *Best* v. *Stonehewer*, 2 D. J. & S. 537.

(*u*) 33 L. J. Ch. 183.

(*x*) 29 W. R. 480. See also *Re Woods' Will*, 31 Bea. 323; *Re Venn*, [1904] 2 Ch. 52.

(*y*) 35 Bea. 307.

If shares vest at different times, legatees do not take as a class.

Another principle, which is, I think, established in this branch of the law is, that all the interests of members of the class must vest in interest at the same time. For instance, if there is a gift to A for life, and afterwards to B and the children of C, the class must vest in interest at the death of the testator, although it is capable of enlargement by the birth of subsequent children of C during the lifetime of the tenant for life." As Lord Davey pointed out, if there is a gift of property to A for life, and at his death to be equally divided between his surviving children and B, only those children of A who survive the tenant for life can take, while the interest of B becomes vested at the testator's death; consequently this is not a class gift so far as B is concerned, and if he dies in the lifetime of the testator his share lapses (*z*). In the case at bar Lord Davey came to the conclusion that the testator treated A as if she had attained twenty-one, and made a special class of nephews and nieces consisting of A and the children of his sister B (*a*).

The principle thus laid down was followed in *Re Venn* (*b*), where there was a gift to the brothers and sisters of X living at her decease, and A, B, and C in equal shares; A and B were in the same degree of relationship to the testatrix, but C was a stranger in blood; it was held by Joyce, J., that the gift was not to a class, and that A having died in the lifetime of the testatrix, his share lapsed.

Class compounded of persons answering different descriptions.

In addition to the kind of composite class referred to above (*c*), there may be a class compounded of persons answering different descriptions, or belonging to different generations. Thus, a class may consist of the children of A, who attain twenty-one, and the issue of such of them as die under that age. Where a gift of this kind is unskilfully framed, the question may arise: "Are there two classes, or is there one class compounded of persons answering one or other of two alternative descriptions?" (*d*). The question has been already discussed with reference to the Rule against Perpetuities, and the distinction has been pointed out between original and substitutional gifts (*e*).

Exclusion of members.

Another way in which a testator can create a special class is by excluding certain named individuals who would otherwise belong to it. Thus in *Dimond* v. *Bostock* (*f*), a testatrix gave

(*z*) *Drakeford* v. *Drakeford*, 33 Bea. 43.

(*a*) The decision in *M'Kay* v. *M'Kay*, [1900] 1 Ir. R. 213 (where the gift was to the testator's wife and his children "then living"), can apparently be supported on the theory that the testator intended the contingency of being alive at the period of distribution to apply to the wife as well as the children.

(*b*) [1904] 2 Ch. 52.

(*c*) *Ante*, p. 410.

(*d*) *Per* Lord Selborne, in *Pearks* v. *Moseley*, 5 A. C. 722

(*e*) *Ante*, p. 306, and Chap. XXXVI, *post*, p. 1283.

(*f*) L. R. 10 Ch. 358.

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property in trust for all the nephews and nieces of her late husband who were living at the time of his decease, except A and B. It was held that this was a gift to a class.

Class ascertained in testator's lifetime.

If the gift is to a class of persons who are ascertained during the testator's lifetime or even at the date of the will, this is in a sense equivalent to a gift to them as *personæ designatæ*, but it is not the less a class gift. Accordingly, in *Lee* v. *Pain* (*g*), where the gift was to M. for life, and after his decease, to his children living at his decease, equally between them, and M. died in the lifetime of the testatrix, leaving three children surviving, one of whom also died in the lifetime of the testatrix, Sir J. Wigram, V.-C., decided that the children living at the death of M. who survived the testatrix took as a class, and that there was no lapse. And in *Leigh* v. *Leigh* (*h*), a bequest to "all the present born children of B equally," was held to be a class gift. The same construction was followed in *Viner* v. *Francis* (*i*), and in *Dimond* v. *Bostock* (*k*)—in each of which cases the bequest was to the children or nephews and nieces of a person dead at the date of the will—notwithstanding a *dictum* to the contrary by Kindersley, V.-C., in *Cruse* v. *Howell* (*l*). But if the gift is to named individuals, also described as a class, they take as *personæ designatæ*; as in *Bain* v. *Lescher* (*m*), where the gift was to "the children of L. D., to wit, J. D., E. D., and A. D." And even if they are not described by name, but only by number, they take as *personæ designatæ*; thus a bequest to "the five daughters of A. B." (*n*), is not a gift to them as a class. In *Re Stansfield* (*o*) the testator directed certain moneys to be divided among "my nine children," and gave his residue upon trust to pay and divide it "equally to and between all my children, except that my oldest son J. . . . shall receive £30 less than each of my other children." It was held by Bacon, V.-C., that the residue was given to the children as *personæ designatæ*. The decision saved the share of a deceased child from lapse under section 33 of the Wills Act (*p*), but on principle the

Bain v. *Lescher.*

(*g*) 4 Hare, 254.
(*h*) 17 Bea. 605.
(*i*) 2 Cox 190.
(*k*) L. R. 10 Ch. 358.
(*l*) 4 Drew, 215. See also *Allen* v. *Callow* (3 Ves. 289) and *Ackerman* v. *Burrows* (3 V. & B. 54), which are sometimes cited in support of the theory that such persons take as *personae designatae*. In *Capes* v. *Dalton*, 86 L. T. 129, *S. C. s. n. Kekewich* v. *Barker*, 88 L. T. 130, where the gift was to "G. B., M. B., and the children now living of R. H.," there seems to have been some divergence of judicial opinion on the question whether it was a gift to a class, but the question of lapse did not arise.
(*m*) 11 Sim. 397.
(*n*) *Re Smith's Trusts*, 9 Ch. D. 117; *Orford* v. *Orford*, [1903] 1 Ir. R. 121.
(*o*) 15 Ch. D. 84.
(*p*) *Post*, p. 421.

decision seems difficult to justify, for it would have excluded an after-born child (*q*).

Where individuals are described only by relationship.

In *Havergal* v. *Harrison* (*r*) it was held that a gift to "the brother and sister of A and my brothers and sister equally," was a gift to the individuals in question, living at the date of the will, as *personæ designatæ*.

Description by reference.

Where a testator gives pecuniary legacies to a number of persons by name, and gives the residue to "all the before mentioned pecuniary legatees," with certain exceptions, in proportion to the amounts of their legacies, this is not a gift to them as a class, and if one of them dies in the testator's lifetime his share lapses (*s*). But a gift to persons by reference may be (or have the same effect as) a gift to them as a class, if that intention appears (*t*).

Persons living at a certain time.

It has been already mentioned, that a gift to such a number of named persons, as are living at a particular time, or survive the testator, is equivalent to a gift of a class, so far as the question of lapse is concerned (*u*).

Gift to next-of-kin or relations.

"It is not clear," says Mr. Jarman (*x*), "what would be the effect of a gift to certain other classes of persons, as to the next-of-kin or relations as tenants in common of A., a person who dies in the lifetime of the testator, in the event of any of the next-of-kin or relations dying in the interval between the decease of A. and of the testator; since, in every case where such a gift has occurred (and in which the entirety has been held to belong to the surviving next-of-kin at the death of the testator), the bequest seems to have contained no words which could operate to sever the joint tenancy" (*y*). In *Ham's Trusts* (*z*), though there were words which severed the joint tenancy, yet there were other words which prevented the legatees from taking as a class; Sir R. T. Kindersley, V.-C., however, appears to have been of

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(*q*) See the cases cited *post*, pp. 1639 *seq*. The question raised in these cases suggests the desirability of extending section 33 of the Wills Act to gifts to classes.

(*r*) 7 Bea. 49. Compare *Jones* v. *Frewin*, 12 W. R. 369, where Wood, V.-C., seems to have held that a gift to "my nephews and nieces" was a gift to individuals and not to a class; but "it is a very shortly reported judgment and difficult to follow": *per* North, J., in *Re Hannam*, [1897] 2 Ch. 46.

(*s*) *Re Gibson's Trusts*, 2 J. & H. 656; compare *Nicholson* v. *Patrickson*, 3 Giff. 209. As to the decision in *Russell* v. *Kellett* (3 Sm. & G. 264), where the bequests were charitable, *vide ante*, p. 230.

(*t*) See *Knight* v. *Gould*, 2 M. & K. 295, *post*, p. 414.

(*u*) *Re Spiller*, 18 Ch. D. 614.

(*x*) First ed. p. 299.

(*y*) *Bridge* v. *Abbot*, 3 Br. C. C. 224; *Vaux* v. *Henderson*, 1 J. & W. 388, n.

(*z*) 2 Sim. (N.S.) 106; see this case stated *post*, Chap. XLI, where the cases settling the period at which next-of-kin are to be ascertained are stated.

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opinion that without the latter words the gift would have been a gift to a class, and would have taken effect in favour of those only who survived the testator.

Gifts to executors beneficially.

As a general rule, a gift to "my executors herein named," beneficially as tenants in common, is a gift to them as individuals, and not as a class, so that if one of them predeceases the testator, or renounces, his share lapses (*a*). The case of *Knight* v. *Gould* (*b*) is no authority to the contrary. There the testator bequeathed the residue of his estate "to my executors hereinafter named, to enable them to pay my debts, legacies, funeral and testamentary charges, and also to recompense them for their trouble, equally between them"; and it was held that the executors took as a class in their official character, and that one having predeceased the testator, the whole went to the survivors. The decision no doubt gave effect to the intention, for the "recompense" was to go with the "trouble." Besides, the survivors took the whole in trust to pay debts; and the same persons were, by the words of the will, entitled to keep for their own benefit what remained after such payment. The case turned on the special terms of the will (*c*).

Knight v. *Gould.*

Lapse of devise of charged property.

III.—Gifts by way of Charge or Condition.—Mr. Jarman points out (*d*) that "where an estate is devised to one, charged with a sum of money, either annual or in gross, in favour of another, the charge is not affected by the lapse of the devise of the onerated property. Thus, if Blackacre be devised to A and his heirs, charged with or on condition that he pay £50 a year, or the sum of £500, to B, and it happens that A dies in the testator's lifetime, his (the testator's) heir at law (or his residuary devisee, if the will is subject to the new law) will take the estate charged with the annuity or legacy in question (*e*). This principle is strongly exemplified in the case of *Oke* v. *Heath* (*f*), in which a person having a power of appointment over a sum of money, by will appointed a less sum (part of the fund in question) to A; and in consideration thereof A was to pay to his mother an annuity of £100 during her life for her separate

(*a*) *Barber* v. *Barber*, 3 Myl. & C. 688; *Hoare* v. *Osborne*, 33 L. J. Ch. 586.

(*b*) 2 Myl. & K. 295.

(*c*) The case is always treated as a decision on gifts to a class (see *Re Gibson's Trusts*, 2 J. & H., at p. 662).

(*d*) First ed. p. 300.

(*e*) *Wigg* v. *Wigg*, 1 Atk. 382; *Hills* v. *Wirley*, 2 Atk. 605; *Re Kirk*, 21 Ch. D. 431.

(*f*) 1 Ves. Sen. 135. See *Re Arrowsmith*, 6 Jur. (N.S.) 1231, and on appeal (where the point did not arise) 2 D. F. & J. 474. See also *Re Kirk*, 21 Ch. D. 431, where the charge was simply in exoneration of the personal estate.

use, and to enter into a bond, with a penalty, for the payment thereof; and the testatrix gave the residue of what she had power to dispose of to B. A died in the testatrix's lifetime, yet the mother was held to be entitled to her annuity out of the fund, the whole of which, by the death of A, had devolved to B, the residuary appointee.

Destination of a lapsed specific sum charged on real estate.

"In the converse case, namely, where the person for whom the money is to be raised dies in the testator's lifetime, it is more difficult to determine the destination of the lapsed interest, the question being then embarrassed by the conflicting claims of the devisee of the lands charged, and of the heir of the testator: the former contending that the charge has become extinct for his benefit; and the latter, that the lapsed sum is to be regarded as real estate undisposed of by the will.

Rule as to contingent charges.

"This, at least, is clear, that where land is charged with a sum of money upon a contingency, and the contingency does not happen, the charge sinks for the benefit of the devisee (*g*). As in the case of a devise of land to A, charged with a legacy to B, provided B attain the age of twenty-one, as to which Lord Eldon (*h*) has observed, 'The devise is absolute as to A, unless B attain the age of twenty-one: if he does, he is to have the legacy. But his attaining the age of twenty-one is a condition, upon which alone he is to have it; and, if he does not attain that age, then the will is to be read as if no such legacy had been given, and the heir at law does not come in because the whole is absolutely given to the devisee; but a gift which fails must clearly be intended, upon the failure of the condition, to be for the benefit of the devisee.' It would, of course, be immaterial, in such case, whether the death of the legatee during minority occurred in the testator's lifetime or afterwards.

Where liable to failure by death, though not expressly contingent.

"Where a legacy, payable *in futuro*, though not expressly contingent, is bequeathed in such a manner as that it would fail by the death of the legatee before the time of payment (and such is always the rule where the postponement is referable to the circumstances of the legatee, and is not made for the convenience of the estate), the case evidently falls within the principle of Lord Eldon's reasoning; and, consequently, if the legatee die before the vesting age, whether in the lifetime of the testator or not, the charge sinks in the estate.

Charges absolute in event.

"It is to be observed, also, that a legacy which, though

(*g*) *Att.-Gen.* v. *Milner*, 3 Atk. 112; *Croft* v. *Slee*, 4 Ves. 60; *Re Cooper's Trusts*, 23 L. J. Ch. 25, 4 D. M. & G. 757. "But such a gift as that in *Att.-Gen.* v. *Milner*, would now be held to be vested." (Note by Mr. Jarman.)

(*h*) *Tregonwell* v. *Sydenham*, 3 Dow. 210. As to the effect of an express direction by the testator that in a certain event the sum is to sink into his residuary personal estate, see *Johnson* v. *Webster*, 4 D. M. & G. 474, *post*, p. 761.

originally made contingent, becomes absolute by the effect of events in the testator's lifetime (subject, of course, to a liability to failure by lapse), is to be regarded, in applying the doctrine in question, in precisely the same light as if it were originally absolute. Thus, if land be devised, charged with a specific sum to A, on condition of his attaining the age of twenty-one years, and A do attain that age, and subsequently die in the testator's lifetime, the gift receives the same construction as if it had not originally been made conditional on his attaining the prescribed age."

Destination of sums payable out of land.

With respect to the general question, as to the destination of sums charged on real estate which lapse by the death of the legatee in the testator's lifetime, or the gift of which is void *ab initio*, the older authorities are chiefly cases in which gifts of specific sums were void *ab initio*, and the decision in each case generally turned upon the question whether the gift was an exception from the residuary devise, or a mere charge upon the land. Owing to the limited operation of a residuary devise under the law before the Wills Act, 1837, if the gift was an exception, the heir took the benefit in the event of its failure; if the gift was a mere charge on the land, the specific devisee took the benefit of its failure (*k*). The cases are not altogether consistent, partly because some of them proceeded on "the strong reluctance in the Court to disinherit an heir at law" (*l*), while in other cases the Court treated the question as one of intention.

The decisions in favour of the heir are *Arnold* v. *Chapman* (*m*); *Gravenor* v. *Hallum* (*n*); *Bland* v. *Wilkin* (*o*); *Henchman* v. *Att.-Gen.* (*p*) : in favour of the devisee, *Jackson* v. *Hurloch* (*q*); *Kennell* v. *Abbott* (*r*); *King* v. *Denison* (*s*); *Cook* v. *Stationers' Co.* (*t*).

Since the Wills Act many cases have been decided bearing on this question. In considering them the alteration made in the law by section 25 of the Wills Act (*u*) must be borne in mind.

(*k*) *Per* Leach, M.R., *Cooke* v. *Stationers' Co.*, 3 Myl. & K., p. 264.

(*l*) See the remarks of Lord Camden in *Gravenor* v. *Hallum* (Amb. 643), and of Lord Eldon in *Tregonwell* v. *Sydenham* (3 Dow, 210). The views of Mr. Jarman, as expressed in the first edition of this work, were also strongly in favour of the heir. The tendency of the Courts seems now to be the other way : see *Freeman* v. *Freeman*, 5 D. M. & G. 704.

(*m*) 1 Ves. Sen. 108.

(*n*) Amb. 643.

(*o*) 1 B. C. C. 61 n.

(*p*) 3 Myl. & K. 485.

(*q*) Amb. 487; better reported 2 Ed. 263.

(*r*) 4 Ves. 802.

(*s*) 1 V. and B. 260.

(*t*) 3 Myl. & K. 262.

(*u*) *Post*, p. 924.

Ridgway v. *Woodhouse.*

In *Ridgway* v. *Woodhouse* (*x*), where a testator devised real estate in trust for his wife for her life, but in case his wife's sister should reside with her, he directed his trustees to retain out of the rents £100 for every day of such residence, and pay the same to a charity, Lord Langdale, M.R., said: "The direction to pay to the charity is void, and consequently the direction to retain, so far as it was intended to operate for the benefit of the charity, was also void, and had no effect; and that purpose failing, I think the direction to retain must fail altogether."

Re Cooper's Trusts.

The point under consideration was much discussed in *Re Cooper's Trusts* (*y*), in which there was a specific devise on trust in the first place to raise £2,000 by sale or otherwise; and, "after raising as aforesaid," the estate was to be in trust for the testator's son and his issue. One half of the £2,000 was directed to be held in trust for a daughter of the testator for life, and afterwards for her children. Then followed a residuary devise. The daughter survived the testator, but died without ever having had a child: it was held that the £2,000 was a charge on the estate, and not an exception, and that the £1,000 which lapsed after the death of the daughter sank for the benefit of the specific devisee. Sir W. P. Wood, V.-C., treated the distinction between an exception and a charge as settled; the question was to which head the case before him belonged. He said: "I was very much struck throughout with the ingenious argument in support of its being an exception. But when one looks through the cases, one is surprised to find—I do not know whether any case has arisen—but I do not find a single case in the books where a sum of money to be paid out of an estate has ever been held to be an exception. I cannot find a single case in the books to that effect."

Sutcliffe v. *Cole.*

In *Sutcliffe* v. *Cole* (*z*) the testator devised lands specifically to A subject to a charge of £7,000, which he directed his executors to raise by mortgage or sale, and he directed £1,000, part of the £7,000, to be appropriated to a person who predeceased the testator. Kindersley, V.-C., held that A took the estate discharged of the £1,000. "If there is a devise of real estate less something, a devise with an exception out of it, the devisee can take no more than the actual devise. But if there is a devise subject to a charge for the particular purpose of a

(*x*) 7 Bea. 437.

(*y*) 23 L. J. Ch. 25; 4 D. M. & G. 757. See *Re Newberry's Trusts*, 5 Ch. D. 746. In that case the question did not arise, because the charge was on land comprised in a residuary devise.

(*z*) 3 Drew. 135.

benefit to some individual, then it is a devise of the whole estate, and not of an estate less something."

In *Tucker* v. *Kayess* (*a*) the testator bequeathed to his executors a sum of money, "to be chargeable and paid as hereinafter mentioned," upon trusts which eventually failed by reason of the testator leaving no children; he then devised certain lands to A subject to the payment of the said sum: it was held by Wood, V.-C., that the case fell within the principle of *Re Cooper's Trusts* (*b*), and that the charge sank into the devised property for the benefit of the devise. The V.-C. said: "It comes back to the old distinction between an exception and a charge. The true test being this: Is the thing in question excepted out of the devised property—did the testator mean to give that property minus the thing in question, or is it a charge upon the devised property? If it is excepted out of the devised property, it goes to the residuary devisee; if it is a charge on the devised property, it sinks into that property for the benefit of the person to whom it is devised; and this case, I must say, is one of the strongest I ever saw of the latter description. I made the observation in *Re Cooper's Legacy*, that 'I do not find a single case in the books where a sum of money to be paid out of an estate has ever been held to be an exception,' and I am still of that opinion." However, in *Heptinstall* v. *Gott* (*c*), the Vice-Chancellor took somewhat different ground. There the testator gave his daughter four cottages subject to a charge of £150, and bequeathed all his personal estate to certain children and grandchildren, including the daughter. No specific disposition was made of the £150: it was held that the £150 sank for the benefit of the devisee. The V.-C. explained that the principle on which he acted in *Re Cooper's Trusts* (*d*), was "that if you can ascertain from the terms of a will that a charge is meant as an exception out of a gift, there the charge will be operative, although the disposition of it may not take effect; but that where the purpose of the charge is merely to provide for some object, and, subject to such purpose, to leave the estate to the devisee, there, if the purpose fails, the charge sinks for the benefit of the devisee." And the V.-C. went on to say that in *Re Cooper's Trusts* the legacy was contingent on the daughter having children, and this not having happened, the charge was held to sink for the benefit of the devisee, but "if any child had ever been in existence, I apprehend that the principle of *Arnold*

(*a*) 4 K. & J. 339. See also *Re Clulow's Trusts*, 1 J. & H. 639.
(*b*) *Ante*, p. 417.
(*c*) 2 J. & H. 449.
(*d*) *Ante*, p. 417.

v. *Chapman* (*e*) would have applied." If the V.-C. meant to suggest a distinction between the failure of a gift by reason of its illegality, or by reason of there being no one in existence to take the benefit of it, and the failure of a gift by the death of the legatee in the lifetime of the testator, it is submitted that the distinction cannot be supported (*f*). The question is entirely one of intention; unless the testator intended to sever the gift from the devise for all purposes so as to make it an exception from the devise, the devisee will take the benefit of its failure, whether the failure is caused by lapse or by any other means.

Charge in favour of executors.

It seems to follow from Lord Hardwicke's remarks in *Arnold* v. *Chapman* (*g*), that if a testator devises land subject to a condition or charge for securing the payment to his executors of a certain sum of money, and does not expressly dispose of this sum, it will become part of his personal estate, and will not in any event sink for the benefit of the devisee. No such case seems to have arisen. In *Heptinstall* v. *Gott* (*h*), Wood, V.-C., thought such a construction possible, but in the circumstances of that case, inadmissible. In *Simmons* v. *Pitt* (*i*), a testator by his will directed that a sum of £6,000 and interest which he had by deed charged on certain real estate should form part of his residuary personal estate, which he bequeathed upon trusts which were void as to the interest arising from the £6,000; it was held that this interest went to the next-of-kin, and did not sink into the real estate or go to the heir of the testator.

Charges on personal property.

IV.—Charges on Personal Property.—Where personal property is specifically given to A subject to a charge in favour of B, and the gift to B lapses, A takes the benefit of the lapse (*k*). The same rule applies where the charge is on a particular fund (*l*).

In *Fisk* v. *Att.-Gen.* (*m*), a testatrix bequeathed a fund upon trust to apply as much of the income as should be necessary in keeping a grave in repair, and to divide the residue among the poor of the parish : it was held that, the trust to repair the grave being void (*n*), the whole income was applicable to the charitable purpose (*o*). Questions as to the effect of lapse in the case of a charge on a mixed fund of realty and personalty, and as to the

(*e*) *Ante*, p. 416.
(*f*) See the decision of Kindersley, V.-C., in *Sutcliffe* v. *Cole*, *ante*, p. 417.
(*g*) 1 Ves. Sen. 108.
(*h*) *Ante*, p. 418.
(*i*) L. R. 8 Ch. 978. See as to this case Chap. XXI.
(*k*) *Per* Wood, V.-C., in *Tucker* v. *Kayess*, 4 K. & J., at p. 342.
(*l*) *Scott* v. *Salmond*, 1 My. & K. 363.
(*m*) L. R. 4 Eq. 521.
(*n*) *Ante*, p. 218.
(*o*) Followed in *Re Birkett* 9 Ch. D. 576; *Re Vaughan*, 33 Ch. D. 187; *Re Rogerson*, [1901] 1 Ch. 715.

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acceleration of estates and interests by the lapse of preceding interests, are considered elsewhere (*p*).

Wills Act, s. 25. Real estate comprised in lapsed or void devises included in residuary devise.

V.—Provisions of Wills Act.—The doctrine of lapse has been modified by the Wills Act in three important particulars. First, by section 25, which provides: "That unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will."

It seems clear that the object of this enactment was to give to a residuary devise the same sweeping effect with regard to real estate as a residuary bequest has always had with regard to personalty (*q*). Consequently if, under a will made since 1837, a specific devise lapses, or fails as being contrary to law, the land so devised passes under the residuary devise, if the will contains one, and not to the heir (*r*).

Under this enactment, the gift of a sum, forming an exception out of real estate, to a person who dies in the testator's lifetime, or the gift of which is void *ab initio*, will enure for the benefit of the residuary devisee. If, however, the will does not contain an operative residuary devise, or the sum excepted affects the property comprised in the residuary devise, such sum falls to the heir. Of course the Act has no bearing on the question whether the sum be an exception or simply a charge; nor does it do away with the rule that the failure of a mere charge enures for the benefit of the specific devisee, and not of the residuary devisee (*s*); nor, again, does it apply to the class of cases first noticed, in which the gift of a sum of money charged upon land on a contingency, is defeated by the failure of the event (whether it be the decease of the object before a certain age, or otherwise), and not by lapse.

(*p*) *Post*, pp. 700 *seq.*, and *post*, p. 427.

(*q*) Mr Jarman thought that although this was "the immediate design" it was "evidently not the full scope of the clause." He thought that it altered the rule as to charges sinking for the benefit of the devisee under the doctrine above referred to (p. 415). "For instance, if a testator by a will made since 1837, devise Blackacre to A, he paying to B £500, and all the residue of his estate to C, and it happen that B dies in the testator's lifetime, the charge will not sink for the benefit of A, but will be raiseable for the residuary devisee" (First ed. of this work, p. 310). It is quite clear from the cases above cited (pp. 417 *seq.*), that the section has no such operation.

(*r*) *Carter* v. *Haswell*, 3 Jur. (N.S.) 788.

(*s*) *Tucker* v. *Kayess*, 4 K. & J. 339; *Sutcliffe* v. *Cole*, 3 Drew, 135; 24 L J. Ch. 486; and see *ante*, p. 417.

Wills Act, s. 32. Devises in tail not to lapse if devisee leaves issue.

The next alteration in regard to lapse relates to devises in tail, to which section 32 provides: "That where any person to whom any real estate shall be devised for an estate tail, or an estate in quasi entail, shall die in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention should appear in the will."

In wills coming into operation after 1925 section 32 will apply to entailed interests in personalty by virtue of section 130, sub-section 1 of the Law of Property Act, 1925.

Sect. 33. Gift to testator's child or other descendant who leaves issue not to lapse.

The third and remaining alteration concerns gifts to the children or other issue of the testator, as to which section 33 declares, "That where any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed, for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

Remarks upon Wills Act, ss. 32 and 33.

"It will be observed," says Mr. Jarman (*t*), "that the words 'such issue,' occurring in sec. 32, admit of application either to the issue inheritable under the entail, surviving the deceased devisee, or the issue inheritable under the entail generally, whether living at the death of the devisee or not. According to the latter construction, if there be issue living at the death of the devisee or legatee, and also issue living at the death of the testator, the requisition of the statute is satisfied, though the *same* issue should not exist at both periods. Thus if lands be devised to A in tail, who dies in the testator's lifetime, leaving an only child, and such child afterwards die in the testator's lifetime, leaving issue who, or any of whom, survive the testator, the devise would, it is conceived, be preserved from lapse. In the 33rd section, however, there is more difficulty in adopting a similar construction; for in this clause the words 'such issue' would seem to apply exclusively to the issue

Whether same issue must be living at death of devisee and of testator.

(*t*) First edition, p. 312.

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living at the death of the devisee or legatee; and if so, the result would be that in the case of a gift to a child of the testator, if it should happen that such child dies in his lifetime leaving issue, and such issue also dies leaving issue who survives the testator (certainly rather a large assemblage of contingencies to be crowded into the testator's lifetime), the existence of the last-mentioned issue would not prevent the lapse, the issue surviving the testator not being the same issue as existed at the death of the legatee. But here, also, possibly a liberal construction would be adopted by considering the word 'issue' to be used as *nomen collectivum*, namely, as including every generation of issue, and not merely as designating the particular individual or individuals living at the death of the legatee; so that the existence of any person belonging to the same *line* of issue at the death of the testator would suffice to prevent the lapse; and in favour of this construction may be urged the desirableness of assimilating the effect of these two sections of the statute, from the penning and juxtaposition of which it is hardly to be supposed that any such difference was intended."

Lord St. Leonards was of a different opinion. He thought that there was intended to be a difference between sections 32 and 33; and that section 33 "expresses what, looking at the object of the framer, it was no doubt intended to express, that some of the issue living at the death of the devisee or legatee must also be living at the testator's death" (*u*). But in *In bonis Parker* (*x*) Mr. Jarman's view prevailed. There the testatrix gave all her property to her daughter; the daughter died in her lifetime, leaving an only child who also died in the lifetime of the testatrix, leaving a child who survived the testatrix, and it was held by Sir C. Cresswell that the gift was saved from lapse by the 33rd section. Lord St. Leonards nevertheless maintained his view as to the operation of the section: "The decision is contrary to the express words of the statute, and equally contrary, it may be thought, to the intention of the legislature. The case is altogether distinguishable from the provision as to estates tail" (*y*).

Time of legatee's death immaterial.

Section 33 applies: (1) Where the will is made before 1838, if the death of the legatee and the republication of the will take place after the Wills Act came into operation (*z*); (2) where the

(*u*) Real P. Stat. 384 (1st ed.).
(*x*) 1 Sw. & Tr. 523.
(*y*) Real P. Stat. 392 (2nd ed.).
(*z*) *Winter* v. *Winter*, 5 Ha. 306. In that case the legatee died before the execution of the codicil. In *Wild* v. *Reynolds*, 5 N. of C. 1, the legatee died before 1838, and the legacy was held to lapse, although the will was republished in 1840

testator makes a gift to a child who is dead at the date of the will (*a*).

Wills Act does not apply where gift does not lapse, but property passes over to another.

Mr. Jarman goes on to point out that "the application of both the enactments in question is excluded where the devise in tail or the gift to the testator's child or issue is expressly made contingent on the event of the devisee or legatee surviving the testator; for in such a case to let in the heir in tail under section 32 would be something more than substitution: it would be to give the property to the heir in tail in an event upon which the testator has not devised it to the ancestor; and in such a case to hold the child or other descendant of the testator to be entitled under section 33, would be in direct opposition to the language of the will.

Joint tenants.

"Nor, it is conceived, does the statute touch the case of a gift to one of several persons as joint tenants; for as the share of any object dying in the testator's lifetime would survive to the other or others, such event occasions no 'lapse,' to prevent which is the avowed object of both the clauses under consideration (*b*).

Gift to class.

"The same reasoning applies to a gift to a fluctuating class of objects who are not ascertainable until the death of the testator, though made tenants in common. Thus, suppose a testator to bequeath all his personal estate to his children simply in equal shares, it should seem that the entire property would, as before the statute, belong to the children who survive the testator, without regard to the fact of any child having, subsequently to the date of his will, died in the testator's lifetime leaving issue who survive him (*c*). As gifts to the testator's children as a class are of frequent occurrence, their exclusion from this provision of the statute will greatly narrow its practical operation." And the same reasoning applies where there is only one member of the class. Thus in *Re Harvey's Estate* (*d*), the testator gave property to his daughter for life, and after her death to her child or children who should attain twenty-one or marry; the daughter had one child only, who died in the lifetime of the testator, leaving a child who survived the testator: it was held by Chitty, J., that the gift failed. The learned Judge concurred in the view expressed by Mr. Jarman, in the concluding sentence quoted above, but said that the law was too well settled to be now altered.

(*a*) *Mower* v. *Orr*, 7 Ha. 473; *Wisden* v. *Wisden*, 2 Sm. & G. 396.

(*b*) *Re Butler*, [1918] 1 Ir. R. 394.

(*c*) Since Mr. Jarman wrote, the law is settled in accordance with the view above expressed: *Olney* v. *Bates*, 3 Drew. 319; *Browne* v. *Hammond*, Johns. 210.

(*d*) [1893] 1 Ch. 567.

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Gift to a single child to be ascertained at a future time.

If, however, the gift is to a single child, it seems that it may be saved from lapse by section 33, even although the child who is to take is not ascertained at the date of the will. Thus if in *Re Harvey* the gift had been to "my first or only daughter who attains twenty-one or marries," it is submitted that in the circumstances of that case the gift would have taken effect.

Under sect. 33, issue of child dying in testator's lifetime not substituted.

The reader will perceive that section 33 does not substitute the surviving issue for the original devisee or legatee; but makes the gift to the latter take effect, notwithstanding his death in the testator's lifetime, in the same manner as if his death had happened immediately after that of the testator. The subject of gift is, therefore, to all intents and purposes constituted the disposable property of the deceased devisee or legatee, and as such follows the dispositions of his will (*e*). "Hence," as Mr. Jarman remarks (*f*), "occurs this rather novel result, that it cannot be predicated of any will of a deceased person, whose parent or any more remote ancestor is living, what may be the extent of property which it will eventually comprise, and no final distribution can be made pending this possibility of accession."

Construction.

In *Re Mason's Will* (*g*), Romilly, M.R., said he thought that "a very nice point might arise on the statute, as to whether the will of a legatee who predeceases his father, the testator, is to be construed according to the event, or whether it is to be construed as if the legatee had survived the testator."

Contrary intention.

Section 33 applies to the case where a son of the testator dies in his father's lifetime leaving a child *en ventre sa mère*, which child is not actually born until after the testator's death (*h*).

There are not many cases on the question what is a sufficient contrary intention to exclude the operation of section 33. It would be shown if after a gift to such of named persons as attained twenty-one there was a gift over in the event of any of them failing to attain a vested interest (*i*). In *Re Meredith* (*k*) the testator bequeathed a share of furniture and a legacy to his only son and his residue equally between his five children

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(*e*) *Johnson* v. *Johnson*, 3 Ha. 157; *Re Mason's Will*, 34 Bea. 494. If he dies intestate, of course, it goes as part of his estate: *Skinner* v. *Ogle*, 9 Jur. 432.

(*f*) First edition, p. 314. Mr. Jarman adds that "though the will of the original testator *must* be under the new law, the will of the dying child or descendant-legatee need not."

(*g*) 34 Bea. 494.

(*h*) *Re Griffiths Settlement*, [1911] 1 Ch. 246.

(*i*) *Re Wilson*, 123 L. T. 165, the actual decision which depended on other provisions in the will was that a contrary intention had not been shown.

(*k*) [1924] 2 Ch. 552.

including the son. In a codicil the testator said: "Whereas since the date of my said will my son has died and the legacy and share of residue given to him by my said will have lapsed Now with a view to making some provision for the two children of my said son I give to each of them a legacy of £100." It was held that the testator showed an intention to let the legacy and share of residue lapse, and that the operation of section 33 was excluded by a contrary intention. But the section applied to the gift of the furniture.

Other effects of sect. 33.

The effect of the section is to prolong the life of the original devisee or legatee by a fiction for a particular purpose; that purpose is to give effect to the will in which the gift which would otherwise lapse occurs, and it only points out the mode in which that effect is to be given. Thus the subject of gift devolves with any obligation to which, under that will, it would have been subject in the hands of the deceased devisee or legatee if he had actually survived; as an obligation to compensate other legatees under the same will, disappointed by his assertion of rights that defeat their legacies (*l*); and if a devisee of land, being a *feme coverte*, dies without having made an effectual disposition of it by will, her husband will, if the devise is saved from lapse by section 33, be entitled to an estate by the curtesy (*m*). Where a testator bequeathed to his children his residue in equal shares, with a direction that the shares of his daughter B, in case she should survive him, should be subject to the trusts of her marriage settlement, and the daughter died in the testator's lifetime leaving issue, it was held by Pearson, J., that the share was still subject to the direction notwithstanding her death (*n*). So if A devises land to his son B, and B dies in his lifetime leaving issue, and having devised all his property to A, this latter devise lapses, because A is by section 33 deemed to have died in his son's lifetime, and the land goes to B's heir (*o*). If a testator gives a legacy to his daughter, a married woman, who dies intestate in his lifetime, leaving surviving her a husband, who dies before the testator, and two children, who survive him, the effect of the fiction is that the daughter dies a widow, and the two children take the legacy (*p*). If a testator bequeath property to his son, who dies in the father's lifetime, leaving issue and an undischarged bankrupt, the property vests

(*l*) *Pickersgill* v. *Rodger*, 5 Ch. D. 163; see further as to this case, *post*, p. 512.

(*m*) *Eager* v. *Furnival*, 17 Ch. D. 115; *Hope* v. *Hope*, [1892] 2 Ch. 336; *Re Derbyshire*, 75 L. J. Ch. 95.

(*n*) *Re Hone's Trusts*, 22 Ch. D. 663.

(*o*) *Re Hensler*, 19 Ch. D. 612.

(*p*) *Re Allen's Trusts*, [1909] W. N. 181, following *In b. Councell*, L. R. 2 P. & D. 314.

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in the trustee in bankruptcy (*q*). Again, probate duty (or, since August 1, 1894, estate duty) is payable on the death of the testator, not only in respect of the property which passes on his death, but in respect of the property which passes on the fictitious death of a legatee (or devisee) under section 33 (*r*). But the fiction does not prolong the life of the devisee or legatee for all purposes. Thus, an agreement to settle property which should come to the deceased legatee (testator's daughter) "during coverture," was held not to include property which had so come to her only by this fiction (*s*).

Powers of appointment.

The question how far section 33 applies to powers of appointment is considered elsewhere (*t*).

Effect of lapse.

VI.—Effect of Lapse.—It may be useful to state shortly the effect produced under the law before 1926 (*u*) by the lapse of a testamentary gift.

Real estate.

If an ordinary specific devise lapses, the property passes under the residuary devise (*x*). If there is no residuary devise, the beneficial interest passed to the heir. So if the whole or a part of the residuary devise lapses, the property passed to the heir.

Personal estate.

If an ordinary specific, demonstrative or pecuniary legacy or annuity lapses, it falls into residue and passes under the residuary bequest. If there is no residuary bequest, lapsed legacies go to the next-of-kin. So if the whole or a part of the residuary bequest lapses, it goes to the next-of-kin (*y*).

Intestacy produced by lapse.

Where by reason of lapse a testator's will is rendered wholly inoperative, he dies intestate (*z*), or if the lapse only affects a part of his property there is said to be a partial intestacy in respect of that part (*a*). As a general rule, the beneficial interest in the property undisposed of went to the heir at law in the case of realty (*b*), and to the next-of-kin in the case of personalty, the devolution of it being governed by the Statutes of Distribution. But the Intestates' Estates Act, 1890, did not apply to a partial intestacy (*c*).

(*q*) *Re Pearson*, [1920] 1 Ch. 247.
(*r*) *Re Scott*, [1901] 1 K. B. 228.
(*s*) *Pearce* v. *Graham*, 32 L. J. Ch. 359.
(*t*) *Post*, p. 818.
(*u*) In the case of wills coming into operation after 1925 there is no contest between the heir and next-of-kin. See the Administration of Estates Act, 1925.
(*x*) *Post*, p. 924.
(*y*) *Post*, p. 1016.
(*z*) *Re Ford*, [1902] 2 Ch. 605.
(*a*) See Chap. XXI.
(*b*) As to charges on land, see above, pp. 414 *seq.*
(*c*) *Re Twigg's Estate*, [1892] 1 Ch. 579.

Where a person died intestate by reason of his will wholly failing to take effect, the provisions of the Statute of Distributions, 1671, as to advances to children apply (*d*).

Lapse of charge.

If real or personal property is given subject to a charge, and the charge lapses, the general rule is that the devisee or legatee of the property takes the benefit of the lapse (*e*).

Particular estate.

If real property is given by way of remainder to persons in succession, and the gift to one of them lapses, the subsequent remainders are accelerated, and the same rule seems to apply in the case of personalty. But where an executory interest is limited after a contingent interest, and the prior interest lapses, there is an intestacy until it is ascertained whether the contingent interest will take effect or not (*f*).

Gift over made valid by lapse of prior absolute gift.

Property may be devised or bequeathed to A, with a gift over to B which would be void if A survived the testator, yet if A predeceases the testator the gift over is good, the result being that the lapse of the gift to A validates the gift to B. Thus if personal property is bequeathed to A and the heirs of his body, and in case of the failure of issue of A, then to B: this is an absolute gift to A if he survives the testator, and in that case the gift to B is void; if, however, A dies in the lifetime of the testator (apparently whether he leaves issue or not) the gift to B takes effect (*g*). It has not been actually decided that the rule applies to land, but on principle it would appear that it does, and that the rule may be stated in general terms.

Consumable things.

On the same principle, it would seem that a gift of consumable articles to A for life, with remainder to B, would not lapse by the death of A in the testator's lifetime, but would take effect in favour of B (*h*).

(*d*) *Re Ford, supra;* similarly those of section 47 of the Administration of Estates Act, 1925, will apply. See Chap. XXXII.

(*e*) *Ante*, pp. 418 *seq.*

(*f*) *Post*, Chap. XXI. (Acceleration of Future Interests.)

(*g*) *Brown* v. *Higgs*, 4 Ves. 708; *Mackinnon* v. *Peach*, 2 Keen, 555; *Donn* v. *Penny*, 1 Mer. 20; *Williams* v. *Lewis*, 6 H. L. C. 1013; *Re Lowman*, [1895] 2 Ch. 348, overruling *Hughes* v. *Ellis*, 20 Bea. 193; *Greated* v. *Greated*, 26 Bea. 621, and the *dictum* of Knight Bruce, V.-C., in *Harris* v. *Davis*, 1 Coll. 416.

(*h*) Theobald on Wills, 8th ed., p. 73, where *Andrew* v. *Andrew*, 1 Coll. 690, is referred to. The views expressed by Knight Bruce, V.-C., on this point, and his *dictum* in *Harris* v. *Davis*, 1 Coll. 416, are contrary to principle: *Re Lowman, supra.*

CHAPTER XIV.

UNCERTAINTY.

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Indulgence shown to testators in the construction of wills.

I.—General Doctrine.—"In the construction of wills," Mr. Jarman remarks (*a*), "the most unbounded indulgence has been shown to the ignorance, unskilfulness, and negligence of testators: no degree of technical informality, or of grammatical or orthographical error (*b*), nor the most perplexing confusion in the collocation of words or sentences, will deter the judicial expositor from diligently entering upon the task of eliciting from the contents of the instrument the intention of its author, the faintest traces of which will be sought out from every part of the will, and the whole carefully weighed together (*c*); but if, after every endeavour, he finds himself unable, in regard to any material fact, to penetrate through the obscurity in which the testator has involved his intention, the failure of the intended disposition is the inevitable consequence. Conjecture is not permitted to supply what the testator has failed to indicate; for as the law has provided a definite successor in the absence of disposition, it would be unjust to allow the right of this ascertained object to be superseded by the claim of any one not pointed out by the testator with equal distinctness. The principle of construction here referred to has found expression in the familiar phrase, that the heir is not to be disinherited unless by express words or necessary implication; which, however, must not be understood to imply that a greater degree of perspicuity or force of language is requisite to defeat the title of the heir to the real estate of a testator, than would suffice to exclude the claim of the next-of-kin as the successor to the personalty; for though undoubtedly, on some points, a difference of construction

(*a*) First edition, p. 315. The 4th section of this chapter, dealing with Misnomer and Misdescription, has been transferred to Chap. XXXV on "Description of Persons and Things."

(*b*) See 3 Keb. pl. 49, 23; *Henniker* v. *Henniker*, 12 Jur. 618; but see *Jackson* v. *Craig*, 20 L. J. Ch. 204, 15 Jur. 811; *Baker* v. *Newton*, 2 Bea. 112; *Langley* v. *Thomas*, 6 D. M. & G. 645.

(*c*) See *Minshull* v. *Minshull*, 1 Atk. 411.

has obtained in regard to these several species of property, that difference is ascribable, rather to the diversity in their respective nature and qualities, than to any disparity of favour towards the claims of the heir and next-of-kin (*d*).

"In modern times instances of testamentary gifts being rendered void for uncertainty are of less frequent occurrence than formerly; which is owing probably, in part, to the more matured state of the doctrines regulating the construction of wills, which have now assigned a determinate meaning to many words and phrases once considered vague and insensible, and in part to the more practised skill of the courts in applying these doctrines. Hence the student should be cautioned against yielding implicit confidence to any early cases (*e*), in which a gift has been held to be void for uncertainty, the principle whereof has not been recognised in later times.

"To the validity of every disposition, as well of personal as of real estate, it is requisite that there be a definite subject and object; and uncertainty in either of these particulars is fatal."

Uncertain condition.

A condition may be void for uncertainty (*f*).

Uncertainty as to operation of limitation.

A gift may be void for uncertainty, not because there is any doubt as to the intention of the testator, but because it is uncertain when and how the gift will take effect. Thus in *Re Viscount Exmouth* (*g*), the testator, who was a peer, bequeathed chattels to trustees to go with the title as heirlooms, so far as the rules of law and equity would admit, and so that no person in existence at the testator's death, or born in due time afterwards, and afterwards coming to the title, should have any other than a life

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(*d*) The rule in favour of the heir and next-of-kin to which Mr. Jarman refers is still occasionally cited (as in *Re Cameron*, 26 Ch. D. 19), but it may be doubted whether the rule has much, if any, real force at the present day. The presumption is rather the other way, namely, that when a man makes his will he does not intend to die intestate as to any part of his property (see *Goodman* v. *Goodman*, 1 De G. & S. 695). In *Re Roberts* (19 Ch. D. 520), Jessel, M.R., said: "The modern doctrine is not to hold a will void for uncertainty unless it is absolutely impossible to put a meaning upon it. The duty of the Court is to put a fair meaning on the terms used, and not, as was said in one case, to repose on the easy pillow of saying that the whole is void for uncertainty."

Since this note was written, Mr. J. S. Vaizey has been good enough to draw my attention to a passage in Lord Alvanley's judgment in *Booth* v. *Booth* (4 Ves. 407): "Every intendment is to be made against holding a man to die intestate, who sits down to dispose of the residue of his property." This doctrine, however, seems to have been originally confined to personal property, for there cannot be any doubt that the presumption in favour of the heir was stronger than in favour of the next-of-kin. (Note by C. Sweet.) See also *per* Shadwell, V.-C., in *Lett* v. *Randall*, 10 Sim., at p. 115, and *per* Grant, M.R., in *Leake* v. *Robinson*, 2 Mer., at p. 386.

(*e*) *Pride* v. *Atwicke*, 1 Keb. 692, 754, 773; *Price* v. *Warren*, Skinn. 266 2 Eq. Ca. Ab. 356, pl. 2.

(*f*) *Post*, p. 1439.

(*g*) 23 Ch. D. 158, following the principles laid down in *Egerton* v. *Earl Brownlow*, 4 H. L. C. 1, and *Clavering* v. *Ellison*, 7 H. L. C. 707.

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interest in the same, and so that no person should acquire an absolute interest in the same until the expiration of twenty-one years after the decease of all such persons as should be in existence at the time of the testator's decease and afterwards attaining the title; it was held that the latter clause of these limitations was void for uncertainty in operation, and that the first person born after the death of the testator who attained the title acquired an absolute interest in the chattels.

Re Moore.

In *Re Moore* (*h*) the testatrix bequeathed a sum of stock to trustees upon trust to apply the dividends in maintaining and keeping in repair a certain tomb "for the longest period allowed by law, that is to say, until the period of twenty-one years from the death of the last survivor of all persons who shall be living at my death." It was held that the gift was void for uncertainty. It seems difficult to bring this decision within the principle of the cases cited above: there was no uncertainty in the operation of the limitation; the only difficulty was that of evidence. It is submitted, however, that the gift was an infringement of the Rule against Perpetuities (*i*).

Gift of "all" held too indefinite.

II.—Uncertainty as to the Subject of Disposition.—Mr. Jarman remarks (*k*) that, "A simple example of a devise rendered void by uncertainty as to the intended subject-matter of disposition, is afforded by the early case of *Bowman* v. *Milbanke* (*l*), where the words, 'I give all to my mother, all to my mother,' were adjudged insufficient to carry the testator's land to his mother, as it was wholly doubtful and uncertain to what the word 'all' referred (*m*).

"In *Mohun* v. *Mohun* (*n*), the will consisted merely of these words: 'I leave and bequeath to all my grandchildren, and share and share alike.' By a codicil the testator appointed

(*h*) [1901] 1 Ch. 936.

(*i*) *Ante*, p. 267.

(*k*) First edition, p. 317.

(*l*) "1 Lev. 130, 1 Sid. 191, T. Raym. 97, s. c. But in another early case (*Tayler* v. *Web*, Styles, 301, 307, 319; s. c. nom. *Marret* v. *Sly*, 2 Sid. 75), the words, 'I make my cousin, Giles Bridges, *my sole heir*, and my executor,' were held to constitute the cousin devisee in fee of the testator's lands: it being observed, that the testator not only made him his heir, but his executor also; and if he should not have the lands, the word 'heir' was nugatory, for, by being executor only, he should have the goods. The word 'heir' was said to imply two things: first, that he should have the lands; secondly, that he should have them in fee-simple." (Note by Mr. Jarman.) See also *Parker* v. *Nickson*, 1 D. J. & S. 177, "I acknowledge A to be heir." *Ante*, p. 76 and *post*, p. 603.

(*m*) This seems to be one of those early cases against which Mr. Jarman warns the student (*ante*, p. 429). One of the arguments which weighed with the Court was that "all" was an adjective and not a substantive: this showed a remarkable ignorance of grammar on the part of the Court. In *Re Shepherd*, 58 Sol. J. 304, "all" was held to pass realty.

(*n*) 1 Sw. 201.

certain persons to be trustees for his grandchildren and nieces : Sir T. Plumer, M.R., held that this was too uncertain to create a devise. It had been contended, he said, that the whole difficulty would be removed by the transposition of the word 'all,' which, in its present situation, was without effect, the word 'grandchildren' including all who correspond to that description; but his Honor observed that there was uncertainty both in the subject and object of the bequest, and the Court could not transpose words for the purpose of giving a meaning to instruments that had none.

Remark as to transposition of words.

"To authorize the transposition of words, it is clearly not enough (as hereafter shown (*o*)) that they are inoperative in their actual position : they must be inconsistent with the context. In the case just stated the word 'all,' though silent where the testator had placed it, was not repugnant; and it is observable that the transposition of the word 'all,' even if justifiable, would not, according to *Bowman* v. *Milbanke*, have supplied a definite subject of disposition."

"After legacies, etc., are paid, I leave to A," residue held to pass.

At the present day, however, the Court is always anxious to give effect to the testator's intention, even if vaguely expressed. Thus in *Re Bassett's Estate* (*p*), after giving several legacies, the will proceeded, "after these legacies and my funeral expenses are paid, I leave to my sister A, without any power or control of her husband; in case of her death to be equally divided amongst her children or grandchildren" : this was held by Bacon, V.-C., to be a good gift of the residue to A. And if a testator, after making specific and pecuniary bequests, proceeds thus : "and all the rest to be divided between A and B," this operates, without question, as a gift of the residue, real as well as personal (*q*).

"The said."

Sometimes uncertainty is caused by a testator disposing of various parts of his property and effects, and then referring to "the said property and effects" in such a way as to make it doubtful whether he means (1) the property and effects last disposed of, or (2) the share of all his property and effects previously given to a certain person, or (3) all his property and effects. In such a case, the intention must be collected from the whole will (*r*). As a general rule, "the said" refers to the immediate antecedent (*s*).

Sometimes a gift may be void for uncertainty by reason of

(*o*) Chap. XVIII, *post*, p. 570.

(*p*) L. R. 14 Eq. 54.

(*q*) *Attree* v. *Attree*, L. R. 11 Eq. 280. In that case the question was not argued as to the personal estate; as to the real estate, see *post*, p. 973.

(*r*) *Re Willomier's Trusts*, 16 Ir. Ch. R. 389.

(*s*) *Healy* v. *Healy*, Ir. R. 9 Eq. 418, and other cases cited *post*, as to the meaning of "the said" when applied to persons.

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Uncertainty arising *ex post facto.*

events which have happened during the testator's lifetime, since the execution of the will. Thus in *Re Gray* (*t*) a testator bequeathed fifty shares in a certain company; at the date of the will the testator held seventy shares of £100 each in an unlimited company of that name; subsequently the company was turned into a limited company, and the testator's seventy shares were converted into 140 shares of £60 each : it was held, the bequest being general, that it was impossible to ascertain what the legatees took, and that the gift consequently failed (*u*).

Effect of blank.

A blank does not necessarily make a bequest void for uncertainty; thus a bequest of " .. hundred pounds " is a good bequest of £100 (*x*).

Gift of an indefinite part void

Where the intended subject-matter of disposition consists of an indefinite part or quantity, the gift necessarily fails for uncertainty. On this principle, a bequest of " some of my best linen " (*y*), or " of a handsome gratuity to each of my executors " (*z*), has been held void.

—except where the will furnishes grounds for estimating the amount.

But a distinction seems to be taken where the will furnishes some ground on which to estimate the amount intended to be bequeathed. Thus, in *Jackson* v. *Hamilton* (*a*), where the testator directed his trustees to retain a reasonable sum of money to remunerate them for the trouble they should have in carrying out the trusts of his will, it was referred to the master to ascertain what would be a reasonable sum. So, where the bequest is for the maintenance, support, and education of an infant, or for the maintenance and support of an adult person, or to set him up in business, although no amount be specified, the Court will determine the amount to be applied for that purpose (*b*), unless the amount is left to the discretion of a named person, in which case he can determine it (*c*), or unless the words used are too vague to furnish a basis of calculation (*d*). And a bequest of " £3,000 or thereabouts," to be raised by accumulating annual income, has been held good : the words " or thereabouts " being considered as used only to meet

Bequest for maintenance, etc., of an infant or adult good, though no sum specified;

(*t*) 36 Ch. D. 205.

(*u*) As to the rule where a gift of shares or stock is specific, see *Re Slater*, [1906] 2 Ch. 480; [1907] 1 Ch. 665. See also *post*, pp. 1043, 1056.

(*x*) *Makeown* v. *Ardagh*, Ir. R. 10 Eq. 445, but a complete blank would be void : *Hartshorne* v. *Nicholson*, 26 Bea. 58.

(*y*) *Peck* v. *Halsey*, 2 P. W. 387.

(*z*) *Jubber* v. *Jubber*, 9 Sim. 503.

(*a*) 3 J. & Lat. 702.

(*b*) *Broad* v. *Bevan*, 1 Russ. 511, n.; *Pride* v. *Fooks*, 2 Bea. 430; *Kilvington* v. *Gray*, 10 Sim. 293; *Batt* v. *Anns*, 11 L. J. Ch. 52; *Thorp* v. *Owen*, 2 Hare, 610; *Pedrotti's Will*, 27 Bea. 583; and see 1 Sim. (N.S.) 103, and other cases noticed along with the above, *post*, pp. 439 *seq.*

(*c*) As to discretionary trusts for the benefit of a certain person, see *Lewis* v. *Lewis*, 1 Cox, 162; *Re Sanderson's Trust*, 3 K. & J. 497, and other cases cited in Chap. XXIV, pp. 861 *seq.*

(*d*) *Abraham* v. *Alman*, 1 Russ. 509.

the difficulty which would arise in accumulating up to the exact limit, and to render any little excess, occasioned by the addition of an entire dividend, subject to the same disposition as the specified sum (*e*). So, where a Scottish testator expressed a wish (in effect) to establish in Dundee a hospital for one hundred boys, like, but less than, Heriot's Hospital, but omitted to say how much was to be appropriated for the purpose, it was held in the House of Lords (*f*) that the testator had sufficiently defined his object to enable the Court to determine the amount required for it. And where a testator creates a trust for the repair of a tomb, or the like (*g*) (not forming part of a church), although this, as already noticed (*h*), is a void trust, the Court will determine what would have been required for it, if a determination on that point is needed in order to give practical effect to other parts of the will (*i*). So also, where (*k*) a testatrix bequeathed a sum of £2,000 to be disposed of "in and about restoring, altering and enlarging, and improving the church, parsonage house, and school" at M., and as to the residue thereof upon the trusts declared by her will concerning the proceeds of sale of her real estate, it was held that the gift was good to the extent to which it might be ascertained that the money would be required for such of the specific objects as were already in mortmain, and an inquiry was directed for the purpose of ascertaining the amount so required.

—for founding a school;

—for repairing church, etc.

In *Re Porter* (*l*) a bequest the income of which was to be applied by the trustees to the maintenance and upkeep of a masonic temple and the balance (if any) to be applied for masonic charities, was held void for uncertainty because the whole income was charged with a trust for a primary object which was invalid, as a gift for the upkeep of a masonic temple was not charitable.

Masonic temple.

Where there is a gift for charitable purposes and also for purposes of an indefinite nature not charitable, and no apportionment is made by the will, so that the whole might be applied for either purpose, the whole gift is void for uncertainty. But where there is a gift for a charitable purpose and for another ascertained object, it will either be apportioned between them,

Charitable purposes and other purposes.

(*e*) *Oddie* v. *Brown*, 4 De G. & J. 179, diss. K. Bruce, L.J.

(*f*) *Magistrates of Dundee* v. *Morris*, 3 Macq. 169; see also *Adnam* v. *Cole*, 6 Bea. 353; and *Macduff* v. *Spence's Trustees*, [1909] S. C. 178.

(*g*) *Fisk* v. *Att.-Gen.*, L. R. 4 Eq. 521; *Re Birkett*, 9 Ch. D. 576; *Re Rogerson*, [1901] 1 Ch. 715. The decision in *Fowler* v. *Fowler*, 33 Bea. 616, *contra*, must be considered overruled.

(*h*) *Ante*, p. 210.

(*i*) See *Chapman* v. *Brown*, and other cases cited *ante*, p. 218, and *post*, p. 442.

(*k*) *Champney* v. *Davy*, 11 Ch. D. 949.

(*l*) [1925] 1 Ch. 746.

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or equally divided. The cases have been already considered (*m*).

Where the amount is differently stated.

A bequest of a sum "not exceeding" £100 (*n*), or of "£50 or £100" (*o*), will be construed in a manner most beneficial to the legatee, and is, therefore, a good gift of the whole £100; and a bequest will not be void for uncertainty, merely because the amount is differently stated in different parts of the will, if the Court can collect that one statement was evidently a mistake, even though the mistake be contained in the very words of gift (*p*).

Uncertainty as to the share the devisee is to take.

An instance of uncertainty in the subject of gift occurred in *Jones* d. *Henry* v. *Hancock*, which underwent much discussion (*q*). The testator devised lands to his daughter, Ann Henry, for life, with remainder to her first and other sons in tail male, remainder to his other daughter Frances. The devise to Ann was upon condition that she married a man possessed of a property at least equal to, if not greater than, the one he left her. The testator then proceeded as follows: "And if she marries a man with less property than that, in that case I leave her only as much of mine as shall be equal to the property of the man she marries; and all the remainder of my property shall immediately pass over and be given up to my second daughter Frances Henry, to whom, in that case, I bequeath it." It was held in D. P., that the devise over was void for uncertainty, as the specific portion or share so given over did not appear in the will itself.

Where subject of gift is to be determined by third person.

The maxim "*id certum est quod certum reddi potest*," applies to gifts which would otherwise be void for uncertainty in the subject. Thus if a testator gives A a power of selecting one of the testator's houses, and devises the other houses to B, this is a good gift to B if A exercises his power of selection (*r*). On this principle it has been held that a gift of portions to daughters, to be determined by the testator's wife and executors, according to the value of their services to the family, and, in the case of the marriage of a daughter, according to the match she might make, is not void for uncertainty, as the discretion given to the wife and executors removes that objection (*s*).

(*m*) *Re Vaughan*, 33 Ch. D. 187, and the cases there cited. *Ante*, pp. 218 *seq.*

(*n*) *Thompson* v. *Thompson*, 1 Coll. 395; *Cope* v. *Wilmot*, 1 Coll. 396, n.; *Gough* v. *Bult*, 16 Sim. 45.

(*o*) *Seale* v. *Seale*, 1 P. W. 290; and see *Haggar* v. *Neatby*, Kay, 379.

(*p*) *Philipps* v. *Chamberlaine*, 4 Ves. 51.

(*q*) 4 Dow. 145. See *Gibbon* v. *Warner*, Dyer, 281, n; *Hoffman* v. *Hankey* 3 My. & K. 376, *post*, p. 449; *Rickards* v. *Rickards*, 2 Y. & C. C. C. 419.

(*r*) See *Boyce* v. *Boyce*, 16 Sim. 476. As to the result of A predeceasing the testator, see *post*, p. 441, where *Jerningham* v. *Herbert*, 4 Russ. 388, is also stated.

(*s*) *Re Conn*, [1898] 1 Ir. R. 337.

A devise to two persons "in such shares as shall be determined by ," would make them tenants in common in equal shares (*t*). On the same principle, an equal division is made where the donee of a power of distribution fails to exercise the power (*u*); or where the gift consists of a general direction that the legatees should "participate" (*x*).

Where devisee is entitled to select.

Where the gift comprises a definite portion of a larger quantity, it is not rendered nugatory by the omission of the testator to point out the specific part which is to form such portion, the devisee or legatee being in such case entitled to select; by which means the subject of the gift is reducible to certainty; and "*id certum est quod certum reddi potest*" is a settled rule in the construction of wills (*y*). Thus, if a man devise two acres out of four acres that lie together, it is said that this is a good devise, and the devisee shall elect (*z*).

So, if a testator devise a messuage, and ten acres of land surrounding it, part of a larger number of acres, the choice of such ten acres is in the devisee (*a*). And if a testator devise to his son John one freehold close of land in R. and to his son George one freehold close of land in R., the devisees must elect: apparently John has the first choice (*b*). On the same principle, where a testator, having three houses in A., devised "two houses in A.," the devisee was held entitled to elect which two he would take (*c*). But in cases of this kind "it is essential that the will should not show that the testator was bequeathing any particular one of the properties to the legatee who desires to select, for the selection by the testator is incompatible with the view that he intended the legatee to select. If a will shows that a testator intends to give a particular property to a legatee, and, owing to the testator having several properties answering the description in the will of the particular property given, you are unable to say, either from the will itself or from extrinsic evidence, which of the several properties the testator referred to, then on principle the gift must fail for uncertainty, and the Court cannot, in order to avoid an intestacy, change the will, or construe it as giving to the legatee the option of choosing any one of the properties. This principle was applied in the case of

Where testator intends to select.

(*t*) *Robinson* v. *Wheelwright*, 21 Bea. 214.
(*u*) *Salusbury* v. *Denton*, 3 K. B. & J. 529.
(*x*) *Liddard* v. *Liddard*, 28 Bea. 266. See also *Greville* v. *Greville*, 27 Bea. 594.
(*y*) *Peck* v. *Halsey*, 2 P. W. 387.
(*z*) *Grace Marshal's Case*, Dy. 281 a, n., 8 Vin. Abr. 48, pl. 11.
(*a*) See *Hobson* v. *Blackburn*, 1 My. & K. 574; *Jacques* v. *Chambers*, 2 Col. 441.
(*b*) *Duckmanton* v. *Duckmanton*, 5 H. & N. 219.
(*c*) *Tapley* v. *Eagleton*, 12 Ch. D. 683

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Richardson v. *Watson* (*d*), though whether that case would now be followed on its particular facts may be doubted" (*e*). In *Asten* v. *Asten* (*f*) the testator gave "all that newly built house being No. Sudeley Place" to A, "all that newly built house being No. Sudeley Place" to B, with similar gifts to C and D. It was held that the devises were void for uncertainty.

Asten v. *Asten.*

Extrinsic evidence.

In such cases the Court strives to ascertain by extrinsic evidence what the testator's intention was (*g*).

Different kinds of shares.

Where a testator bequeaths to A a certain number of shares in a company, and it appears that at the date of his will he held shares in that company of two different classes, one of which is more valuable than the other, and either of which is sufficient to satisfy the bequest, then the legatee has, it seems, the right of selection (*h*). But if the shares of the more valuable class are not sufficient to satisfy the bequest, it is a question of construction out of which class the bequest ought to be satisfied. Thus in *Re Cheadle* (*i*) the testatrix bequeathed to A "my 140 shares in the C. B. Company"; she had 280 shares, of which forty were paid up in full and the remaining 240 were partly paid up: it was held that A was not entitled to select which of the 280 shares she would take, and that the bequest must be satisfied out of the 240 partly paid shares.

Mistake in description.

No question of selection arises if it appears that the testator meant to give the legatee the whole of a certain kind of property belonging to him. Thus where a testator bequeathed all his property in the Austrian and Russian funds, "and also that vested in a Swedish mortgage," the testator having several Swedish mortgages, they were all held to pass (*k*). And where a testator having five leasehold messuages in L., comprised in four leases, bequeathed "his four leasehold messuages in L.," it was held that all five messuages passed upon a context somewhat favouring that construction (*l*).

Indefinite power of selection or disposition.

Sometimes a testator gives a legatee an express power of selection or disposition (*m*), and the question may then arise

(*d*) 4 B. & Ad. 787.

(*e*) *Per* Romer, J., in *Asten* v. *Asten*, [1894] 3 Ch. at p. 263. Cited with approval in *Re Cheadle*, [1900] 2 Ch. 620.

(*f*) [1894] 3 Ch. 260.

(*g*) *Richardson* v. *Watson*, 4 B. & Ad. 787; *Blundell* v. *Gladstone*, 3 Mac. & G. 692.

(*h*) *Jaques* (or *Jacques*) v. *Chambers*, 15 L. J. Ch. 225; 16 L. J. Ch. 243; *Millard* v. *Bailey*, L. R. 1 Eq. 378; *O'Donnell* v. *Welsh*, [1903] 1 Ir. R. 115. The report of *Jacques* v. *Chambers* in 2 Coll. 435, appears to be inaccurate, as the other three reports agree. It would seem from the report in 16 L. J. Ch. 243, and 4 Rail. Ca. 499, that the case was compromised.

(*i*) [1900] 2 Ch. 620.

(*k*) *Richards* v. *Patteson*, 15 Sim. 501.

(*l*) *Sampson* v. *Sampson*, L. R. 8 Eq. 479.

(*m*) As to powers of appointment, see Chap. XXIII, *post*, p. 762.

how far the power extends. Thus, in *Edwardes* v. *Jones* (*n*), where a testator devised to his daughter a house and garden in X, to be built at the expense of his executors, the gift would apparently have been void for uncertainty, if the executor (who was also residuary legatee) had not built a house at the daughter's request. So, where a testator devised the residue of his property to his wife for life, "reserving to her power to will away any part" at her death, with a gift to his daughter of what his wife should not dispose of, it was held that the power extended to the whole estate (*o*). Where a testator bequeathed his household furniture, etc., on trust for sale, except such articles as his wife should wish to retain for her own use, which he thereby empowered her to appropriate, it was said that this intimated a confidence that the wife would make some selection, and would not take the whole; though to what extent short of that is not very clear (*p*). A more rational principle was laid down by Jessel, M.R., in a case where a testator gave his wife power to appropriate absolutely to herself such parts of his plate as she should desire to possess. The Master of the Rolls said, "Of course the widow takes the whole. Following the words literally she might take the whole of the plate with the exception of one article of probably no value, when the maxim *de minimis* would apply" (*q*). The same principle was followed in *Re Sharland* (*r*). The principle would probably not be applied where the things are few in number and of nearly equal value.

Right to select not exercised.

In *Re Madge* (*s*) the testator gave to his wife such of certain articles "as she shall within two calendar months select." The widow only survived a few days and did not exercise her right of selection. Held, that the gift failed.

Gift of what shall remain or be left.

"It may be observed," says Mr. Jarman (*t*), "that in numerous instances a devise or bequest of *what shall remain or be left* at the decease of the prior devisee or legatee, has been held to be void for uncertainty (*u*). Some of these cases certainly had special circumstances, and the indefiniteness seems

(*n*) 35 Bea. 474.

(*o*) *Cooke* v. *Farrand*, 7 Taunt. 122. *Re Richards*, [1902] 1 Ch. 76, was the converse case; there the widow had a power of disposition during her life, but not apparently by will.

(*p*) *Kennedy* v. *Kennedy*, 10 Ha. 438.

(*q*) *Arthur* v. *Mackinnon*, 11 Ch. D. 385.

(*r*) 74 L. T. 664.

(*s*) [1928] W. N. 72; 44 T. L. R. 372.

(*t*) First edition, p. 321.

(*u*) *Bland* v. *Bland*, 2 Cox, 349; *Wynne* v. *Hawkins*, 1 Bro. C. C. 179; *Sprange* v. *Barnard*, 2 Bro. C. C. 585; *Pushman* v. *Filliter*, 3 Ves. 7; *Wilson* v. *Major*, 11 Ves. 205; *Bull* v. *Kingston*, 1 Mer. 314; *Eade* v. *Eade*, 5 Madd. 118. To these may be added *Lechmere* v. *Lavie*, 2 My. & K. 197; *Horwood* v. *West*, 1 Sim. & St. 387, and *Ex p. Payne*, 2 Y. & C. 636, considered by Mr. Jarman in connection with the subject of precatory trusts.

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not to have been invariably considered to be such as to invalidate the gift (*x*). At all events, the expression is susceptible of explanation, where the property, or part of it, consists of household furniture, or other articles of a perishable nature, by considering these words as referring to the expected diminution of the property by the use and wear of the first taker. Such, it is clear, would be the construction, if the property (whatever were its nature) (*y*) were given to the first taker expressly for life; indeed there is not, it is believed, any case in which such expressions have been held to render the gift void, where the prior interest was expressly limited in such terms; and the case of *Cooper* v. *Williams* (*z*) is an authority against such a construction."

But the cases to which Mr. Jarman refers in the opening sentence of this passage, have little if anything to do with the question of uncertainty; they can be supported on a different ground altogether, namely, that if a testator makes an absolute gift of property to A, any gift over of what may be left undisposed of by A is repugnant and void (*a*).

Even a gift to X in trust for A, with a direction that any balance remaining in X's hands after the death of A should go absolutely to B, operates as an absolute gift to A (*b*).

Gift over of so much as shall not have been paid.

But a gift over of a legacy, or of so much thereof as shall not have been paid to the legatee, is not void for uncertainty (*c*).

The question whether a life interest can be implied from a gift of "what shall remain on the death of X," is considered elsewhere (*d*).

Uncertain words will not create precatory trust.

Sometimes a testator gives property to A absolutely, with a request or direction that he will at his death leave the "bulk"

(*x*) *Duhamel* v. *Ardovin*, 2 Ves. Sen. 162; *Hands* v. *Hands*, 1 T. R. 437 n.

(*y*) Except consumable articles: see *Andrew* v. *Andrew*, 1 Coll. 690, and *post*, pp. 1151, 1429.

(*z*) Pre. Ch. 71, pl. 64. Mr. Jarman also cites *Gibbs* v. *Tait*, 8 Sim. 132. The modern cases bearing on this point are cited below, p. 439.

(*a*) *Re Mortlock's Trust*, 3 K. & J. 456; *Weale* v. *Ollive*, 32 Bea. 421; *Perry* v. *Merritt*, L. R. 18 Eq. 152; *Re Wilcocks' Settlement*, 1 Ch. D. 229. Earlier cases are: *Malim* v. *Keighley*, 2 Ves. ~~Jun. 529~~ (disapproving *Upwell* v. *Halsey*, 1 P. W. 651); *Grey* v. *Montagu*, 2 Ed. 205; *Att.-Gen.* v. *Hall*, 1 Jac. & W. 158 n.; *Bourn* v. *Gibbs*, 1 R. & Myl. 614; *Phillips* v. *Eastwood*, Ll. & G. t. Sug. 270; *Watkins* v. *Williams*, 3 Mac. & G. 622; *Ross* v. *Ross*, 1 Jac. & W. 154; *Re Yalden*, 1 D. M. & G. 53; *Holmes* v. *Godson*, 8 D. M. & G. 152; *Bowes* v. *Goslett*, 27 L. J. Ch. 249; *Henderson* v. *Cross*, 29 Bea. 216; *Cuthbert* v. *Purrier*, Jac. 415; *Green* v. *Harvey*, 1 Ha. 428; *Lightburne* v. *Gill*, 3 Bro. P. C. 250. In *Bull* v. *Kingston*, 1 Mer. 314, the gift over ("in case she dies without a will") was held void on the ground of uncertainty. The case of *Borton* v. *Borton*, 16 Sim. 552, is considered elsewhere (Chap. XXXIV).

(*b*) *Re Walker*, *Lloyd* v. *Tweedy*, [1898] 1 Ir. R. 5.

(*c*) *Re Chaston*, 18 Ch. D. 218; *Re Goulder*, [1905] 2 Ch. 100. These cases are cited *post*, p. 2128.

(*d*) Chap. XIX, *post*, p. 626.

or "remainder" of the property to B; this is void, being too uncertain to create a precatory trust (*e*).

Re Percy.

In *Re Percy* (*f*), the testator made the following bequest: "I give to my wife £10,000, afterwards to go to the understated residuary legatee E.": it was held by Bacon, V.-C., that this was an absolute gift to the wife, and that the "inept words" which followed did not affect it. It is submitted that this case is distinguishable from the cases where there is an attempted gift over of what remains or is undisposed of by the prior legatee, and that the obvious intention of the testator was to give his wife only a life interest (*g*).

Trusts of an ascertained fund valid, though intended to embrace another unascertained.

Reference may here be made to the case of *Ford* v. *Fowler* (*h*), where the testator recommended (construed "directed") F. and his wife to settle a sum which he had bequeathed to the latter, "together with such sum of money of his (F.'s) own as F. shall choose," for the benefit of his wife and children. Lord Langdale, M.R., said that there being a certainty as to that which was in the testator's power, the trust as to that did not fail because the testator expressed a wish as to something over which he had no power.

Gift for life followed by gift over of unexpended capital.

Property may, of course, be given to a person for life, with power to appoint or expend the capital, followed by a valid gift over of the unappointed or unexpended part (*i*). But if a testator gives the income of property to his wife for life with a request that if it is more than she wants to live on, she will give the remainder to B, this request is too uncertain to create a trust in B's favour (*k*).

A gift to A for life "and whatever she can transfer to go to her daughters B and C," is void for uncertainty as to B and C (*l*); so is a gift of what a tenant for life "can save out of the income" (*m*).

Power to expend capital.

In *Re Pedrotti's Will* (*n*), a testator bequeathed the income of property to his wife for life, and provided that "in case anything should occur that her income is not sufficient, she shall be at liberty to go to the principal"; it was held by Romilly, M.R., that she was only entitled to so much of the capital as with the income would afford her a maintenance suit-

(*e*) *Eade* v. *Eade*, 5 Madd. 118; *Palmer* v. *Simmonds*, 2 Dr. 221. See *post*, p. 847.
(*f*) 24 Ch. D. 616.
(*g*) See *Re Hanbury*, [1904] 1 Ch. 415, where the question of repugnancy was much discussed.
(*h*) 3 Bea. 146.
(*i*) *Re Roland*, 86 L. T. 78, seems to have been decided on this principle.
(*k*) *Hudson* v. *Bryant*, 1 Coll. 681.
(*l*) *Flint* v. *Hughes*, 6 Bea. 342.
(*m*) *Cowman* v. *Harrison*, 22 L. J. Ch. 993.
(*n*) 27 Bea. 583.

able to her station in life. But in *Re Richards* (*o*), a power given by the testator to his wife to use such portion of the capital "as she may deem expedient," was held to give her a general power of appointment over the capital during her life. And in *Re Willatts* (*p*), a power given to the testator's wife to sell the testator's property, followed by a gift over of what was left at her death, was held to give the wife a life interest, with power to expend any part of the capital as she might think fit, what was left at her death passing under the gift over.

Gift over of what remains after life interest good.

The principle suggested by Mr. Jarman in the passage quoted above (*q*), namely, that where property is given to A for life with a gift over on his death of "what remains" to B, the gift over is good notwithstanding those words, has been applied in several modern cases (*r*). Thus, in *Re Thomson's Estate* (*s*), the testator gave all his property to his wife "for the term of her natural life, to be disposed of as she may think proper for her own use and benefit according to the nature and quality thereof," and "in the event of her decease, should there be anything remaining of the said property or any part thereof," he gave "said part or parts thereof" to certain persons: it was held by Hall, V.-C., and by the Court of Appeal, that the widow had no power to dispose of the property by will, and that on her death the gift over took effect as to any part of the property then existing; whether she had anything more than a right to enjoy the property in specie during her life was not decided. *Re Sheldon and Kemble* (*t*), and *Re Holden* (*u*), are to the same effect. But in *Re Jones* (*x*), the testator gave all his property to his wife "for her absolute use and benefit, so that during her lifetime for the purpose of her maintenance and support she shall have the fullest power to sell and dispose of my said estate," and after her death, as to such parts of his estate as she should not have sold or disposed of as aforesaid, he gave it in trust for other persons: it was held by Byrne, J., that the wife took an absolute interest. On the other hand, in *Re Sanford* (*y*), the testator by his will made certain dispositions concerning his property; by a codicil he revoked these pro-

Re Thomson's Estate.

Re Jones.

(*o*) [1902] 1 Ch. 76.
(*p*) [1905] 2 Ch. 135. The order was made by consent.
(*q*) *Ante*, pp. 437, 438.
(*r*) *Constable* v. *Bull*, 3 De G. & S. 411; *Re Adam's Trust*, 14 W. R. 18; *Re Stringer's Estate*, 6 Ch. D. 1; *Bibbens* v. *Potter*, 10 Ch. D. 733; *Re Sheldon and Kemble*, 53 L. T. 527. See *Scott* v. *Josselyn*, 26 Bea. 174 and *Gude* v. *Worthington*, 3 De G. & S. 389.
(*s*) 14 Ch. D. 263.
(*t*) 53 L. T. 527.
(*u*) 57 L. J. Ch. 648.
(*x*) [1898] 1 Ch. 438.
(*y*) [1901] 1 Ch. 939.

visions and gave all his property to his wife "so that she may have full possession of it and entire power and control over it, to deal with it or act with regard to it as she may think proper"; he then provided that in the event of her dying "without having devised or appointed the whole or any part of my said property," the dispositions contained in his will should take effect. It was held by Joyce, J., that the wife took a life estate with a general power of appointment, and that any part of it which she did not appoint passed under the testator's will. The decision no doubt gave effect to the intention of the testator.

So in *Re Cammell* (*z*) (where *Re Jones* was distinguished) a gift to A "who will at her death dispose of it in such charitable ways for good to result from my hard work in accumulating the property handed over for her use only and to do as she may wish in her lifetime" was held to give A a life estate and the fund on her death to become applicable for charitable purposes.

Where prior gift lapses.

It will be remembered that if property is given absolutely to A with a gift over which is void for repugnancy, and A dies in the testator's lifetime, the gift over will, as a general rule, take effect (*a*).

Gift of what shall be left preceded by a special power of disposition.

Surman v. *Surman*.

Mr. Jarman points out (*b*) that "if the gift of *what shall be left* is preceded by a power of disposition or appropriation reserved to the prior legatee in favour of particular objects, the expression evidently points at that portion of the property which shall be unappointed or unappropriated under the power. As in *Surman* v. *Surman* (*c*), where a testator bequeathed his personal estate to his wife for life or widowhood, with a power to her to apply the same to her own benefit and the maintenance of A and B during minority: and at her decease or second marriage, he gave the same, *or so much as should then remain*, to certain persons; this was held to be a good bequest of the personal estate unapplied to the prescribed purposes."

It is equally clear that if property is given to trustees with a discretionary power to appropriate it or any part of it for certain purposes or in a certain way, and any part of it not so appropriated is given to A, this operates as an absolute gift to A subject to an exercise of the power (*d*).

Distinction between a gift of the whole except an unascertained part and a gift of

It will be observed, that in these cases the words seemed or were considered to provide for carrying over everything that was not disposed of under the power, and, consequently, nothing having been disposed of, the ultimate limitation carried the

(*z*) 69 Sol. J. 345; see also *Re Willis*, [1921] 1 Ch. 44.
(*a*) *Re Stringer*, 6 Ch. D. 1; *Re Lowman*, [1895] 2 Ch. 348; *ante*, p. 427.
(*b*) First edition, p. 322.
(*c*) 5 Mad. 123.
(*d*) *Lancashire* v. *Lancashire*, 2 Ph. 657; 1 De G. & S. 288.

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the remainder after deducting an unascertained part.

whole subject of gift. The next two cases, however, seem to show that if the words are such as to point to a division into parts, and to amount to a gift of the individual parts, then, if one of the parts cannot be ascertained, the legatee of the other part is necessarily disappointed, since his part is undetermined, and the words are not sufficient to carry the whole to him.

Jerningham v. *Herbert.*

Thus, in *Jerningham* v. *Herbert* (*e*), the testatrix gave to A such of her jewels as should at her decease be deposited with Messrs. R., and gave the rest of her jewels to B; at her decease there were no jewels deposited with Messrs. R.; Leach, M.R., said that the will contained no present gift of the jewels, but referred to a future act to be done by the testatrix in order to complete her gift, and that act being prevented, the intended gift wholly failed. Again, in *Boyce* v. *Boyce* (*f*), where the testator devised certain houses in S to trustees upon trust for his wife for life, and after her decease upon trust to convey to his daughter M in fee such one of the houses as she should choose, and to convey and assure all the others which M should not choose to his daughter C; M having died in the testator's lifetime, Sir L. Shadwell, V.-C., said it was only a gift of the houses that should remain, provided M should choose one of them, that no choice had been or indeed could have been made by M, and therefore the gift in favour of C failed. The decision seems somewhat technical, for the testator meant C to take what M did not take, and as M could not take, it might well have been held that the gift in C's favour included the whole.

Boyce v. *Boyce.*

Gift of the residue of a fund after providing for an illegal object is void, if the amount required for such object is unascertainable.

Where the bequest is of the residue or surplus of a specified fund remaining after providing for an object which is illegal or unattainable, and the exact amount to be laid out on which is not specified, the bequest is necessarily void for uncertainty, unless the purpose is such and so defined that the Court can determine what would have been the proper amount to be expended had the object been legal or attainable, or unless (according to some recent cases) the bequest of surplus carries with it all that is not otherwise effectually disposed of. Thus in *Chapman* v. *Brown* (*g*), the testatrix, after giving some legacies, gave all the residue of her real and personal estate to her executors to be applied for the purpose of building or purchasing a chapel where her executors should think it was most wanted, and if any overplus should remain from purchasing or building the same, she directed it to be applied to such charitable uses as her executors should think proper. The bequest for the

Chapman v. *Brown.*

(*e*) 4 Russ. 388.
(*f*) 16 Sim. 476.
(*g*) 6 Ves. 404. This case was distinguished in *Kelly* v. *Att.-Gen.*, [1917] 1 Ir. R. 183.

chapel being void, Sir W. Grant, M.R., declared that the gift of the overplus was void also, since the amount could not be ascertained. "He thought it impossible to frame any direction that would enable the master to form any idea as to what would have been proper to expend upon the chapel. If the testatrix had pointed out any particular place, that might have furnished some ground of inquiry as to what size would be sufficient for the congregation to be expected there, but the gift in question was so entirely indefinite, it was quite uncertain what the residue would have been." Again, in *Att.-Gen.* v. *Hinxman* (*h*), there was a devise of a house to be used as a school for poor persons of the parish of W; the executors were directed to put the house in repair, and to invest a sum of money in stock in the name of the minister, churchwarden, and overseers, who were to apply the dividends for the purposes of the school, and to apply the surplus, if any, after payment of the expenses of the school, among poor parishioners of W, as the trustees should think fit. The devise of the house for the school being void, and the first trust declared of the stock having consequently failed, Sir T. Plumer decided that the gift of the residue of the surplus dividends, being unascertainable, was void. Again, in *Limbrey* v. *Gurr* (*i*), where a testator bequeathed £7,000 upon trust to pay the expenses of the testator's funeral and monument, and of building eight almshouses on a particular piece of ground, and to apply the residue to the trusts directed of a legacy of £8,000, which he bequeathed upon trust out of the income to pay certain weekly sums to the poor persons in the almshouses, to purchase a quartern loaf for twenty other poor persons, and to keeping the almshouses in repair, and to apply the residue in distribution of bread as therein mentioned; Sir J. Leach held that the residue of each sum was unascertainable, by reason of the gifts to the prior objects failing, and the gift of both residues therefore void.

Att.-Gen. v. *Hinxman.*

Limbrey v. *Gurr.*

But if the testator has so defined his object as to furnish fair and reasonable data, the Court will determine the amount which ought to have been expended on it if it had been legal, and thus at the same time ascertain the amount of the surplus. So, in *Mitford* v. *Reynolds* (*k*), the testator, after several bequests, directed the purchase of a particular piece of land, and the construction of a vault for the bodies of himself and his parents and sister, and of a monument, the expense of which purchase and

Secus if the amount is ascertainable.

Mitford v. *Reynolds.*

(*h*) 2 J. & W. 270; and see *Att.-Gen.* v. *Davies*, 9 Ves. 535; *Att.-Gen.* v. *Goulding*, 2 Br. C. C. 428; *Re Taylor*, 58 L. T. 538.

(*i*) 6 Mad. 151.

(*k*) 1 Phil. 185, 706.

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construction was to be met and provided for from the surplus property after payment of debts and legacies. Then came a bequest of the remainder of his property to a valid charitable purpose; and it was held by Lord Lyndhurst that assuming the prior object to be void, yet it was not so uncertain as to the amount that would be required for it as to vitiate the gift to the charity. He thought the difficulties which existed in *Chapman* v. *Brown* had no existence here. The place was defined, the very spot pointed out, and the extent required for the purchase; there was no difficulty in directing a reference to the master for the purpose of ascertaining what would be a proper sum to carry that intention of the testator into effect. That sum, being once ascertained, would be deducted from the residue, the amount of which would then be rendered certain (*l*).

Principle of *Chapman* v. *Brown*.

The principle underlying *Chapman* v. *Brown* is that where the whole of the fund may possibly be wanted for the primary object, there will probably be no surplus for the secondary object, and consequently an inquiry would be useless, and the gift of the surplus fails (*m*). Accordingly, in *Re Taylor* (*n*), where a testator bequeathed money to build and keep up an almshouse on a particular piece of land not in mortmain, and to maintain the inmates and pay any surplus income to poor persons as outdoor pensioners, it was held by Kay, J., that the gift of the surplus income was void for uncertainty.

Where residue is substantial.

But if the position of things is reversed, and the primary purpose is only intended to require a small part of the fund, so as to leave a substantial surplus for the secondary purpose, the gift of the surplus is good, and the only question is what it consists of. Formerly the principle was considered to be, that in such a case an estimate should be made of the amount required for the primary purpose, and that the balance should be applied to the secondary purpose (*o*). It is possible that this principle may still be applicable where the secondary purpose is not charitable, but where it is charitable the rule is now settled that

(*l*) The L.C. held that the direction as to the monument, etc., was a disposition of an integral part of the residue, and that the "remainder" was what was left of such residue after building the monument, 1 Phil. 199. But owing to the peculiar wording of the L.C.'s declaration concerning the charitable gift, Shadwell, V.-C., afterwards thought himself bound to hold that the prior purpose having failed through the refusal of the owner to sell the land, the whole residue was well given to the charity, 16 Sim. 105.

(*m*) In *Chapman* v. *Brown*, "there was nothing to prevent the whole of the residue from being applied to the building of the chapel": *per* Jessel, M.R., in *Re Birkett*, 9 Ch. D., at p. 580.

(*n*) 58 L. T. 538.

(*o*) In the fourth edition of this work the decisions were examined at length; it has not been thought necessary to repeat Mr. Vincent's remarks in this edition, as the law is now settled, at all events so far as Courts of first instance are concerned. The cases are considered in Tyssen on Charitable Bequests (2nd ed.), pp. 148 *seq.*

if the primary purpose is illegal, the whole fund is given to the secondary purpose. This rule was first established by the decision in *Fisk* v. *Att.-Gen.* (*p*) : there the testatrix bequeathed £1,000 to the rector and churchwardens of a parish and their successors upon trust to apply such part of the dividends as should from time to time be required in keeping in repair her family grave, and to pay or divide the residue of the said dividends at Christmas in every year for ever, among the aged poor of the parish. Wood, V.-C., held that the rector and churchwardens took the whole fund for the charitable purpose discharged from the illegal trust. This decision has been criticised, but has never been overruled, and the rule may now be considered as settled that where a fund is given to trustees upon trust to apply the income in keeping a tomb in repair, and as to the remainder of the income for a charitable purpose, the result of the trust for the repair of the tomb being illegal is that the whole of the income becomes applicable for the charitable purpose (*q*).

Charitable gifts, when void for uncertainty.

Although the Courts always strive to give effect to charitable gifts, and never hold them void for uncertainty in the object (*r*), yet a charitable gift may be void if it is impossible to ascertain the amount of the fund required to give effect to it (*s*).

III.—Uncertainty as to Object of Gift.—" Uncertainty in regard to the *objects* of gift," as Mr. Jarman points out (*t*), " arises either from the testator having described such objects by a term of vague and unascertained signification, or from his having specified a definite class or number of persons, but having shown that all are not to take, and then left it in doubt which of them he intended to select as the object or objects of his bounty. Examples of both kinds will be found in the sequel. It has been often laid down that if a devise be to *one* of the sons of J. S. (he having several sons), the devise is void for uncertainty, and

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(*p*) L. R. 4 Eq. 521. The decision of Romilly, M.R., in *Fowler* v. *Fowler*, 33 Bea. 616, is inconsistent with the later cases and may be disregarded. It will be noted that in that case the M.R., if unhampered by authority, would have decided the case in accordance with the principle established by *Fisk* v. *Att.-Gen.*

(*q*) *Re Rogerson*, [1901] 1 Ch. 715, following *Fisk* v. *Att.-Gen.*, L. R. 4 Eq. 521; *Dawson* v. *Small*, L. R. 18 Eq. 114; and *Re Birkett*, 9 Ch. D. 576. See also *Hunter* v. *Bullock*, L. R. 14 Eq. 45; *Re Williams*, 5 Ch. D. 735; *Champney* v. *Davy*, 11 Ch. D. 949; *Re Vaughan*, 33 Ch. D. 187; and *Re Taylor*, 58 L. T. 588, where Kay, J., expressed his concurrence with Jessel, M.R., in the criticism of *Fisk* v. *Att.-Gen.*, made by the latter Judge in *Re Birkett*.

(*r*) *Post*, p. 450, *ante*, p. 215.

(*s*) *Flint* v. *Warren*, 15 Sim. 626; *post*, p. 1232.

(*t*) First edition, p. 322.

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cannot be made good (*u*). And if a man devise to twenty of the poorest of his kindred, this is void for the uncertainty who may be adjudged the poorest (*x*)." So where the devise was "to the testator's brother and sister's family," and the testator had two sisters, the devise was held void (*y*); and a bequest "to and amongst my nephews and nieces John and Nanny" (followed by a blank), or to such of them as should be living at the death of "the tenant of life," was held void for uncertainty, because although by using the plural number, "nephews and nieces," the testator showed he meant to include more than one of each sex, yet by his apparent intention to name those whom he intended for legatees, it was made doubtful whether he meant to include all (*z*).

Blank left for names.

Devise to "a son of A."

But in *Blackburn* v. *Stables* (*a*), a devise "for the sole use and benefit of a son of J. B.," who had no son born during the testator's lifetime, but whose wife was at the testator's death pregnant of a son, was held good. So a devise to "one of my cousin N.'s daughters that shall marry with a Norton within fifteen years," was held good, apparently on the ground that the testator meant the daughter who should first marry a Norton (*b*). A gift in favour of "one child of A" or "a son of A" may appear from the context to mean the eldest (or only) child of A (*c*). And a gift "to the family of Gregory" is not void for uncertainty, if the person whom the testator intended to designate by the name of Gregory can be identified (*d*).

Gift "to the family of A."

Uncertainty caused by extrinsic facts.

In the case above put of a gift to "one of the sons of J. S.," he having several sons, parol evidence is not admissible to remove the uncertainty, because the uncertainty is apparent on the face of the will, "the terms of which suppose the existence of more than one son, and moreover show that the testator had

(*u*) See *Strode* v. *Lady Falkland*, 2 Vern. 624, 625. So "one of my sisters to be executrix": *In b. Blackwell*, 2 P. D. 72; *Russell* v. *Russell*, 12 Ir. Ch. R. 377; *In b. Baylis*, 2 Sw. & T. 613.

(*x*) *Webb's Case*, 1 Roll. Ab. 609 (D), 1; *et vid. Scrope's Case*, 49 Ed. 3, pl. 4, cited 2 Bulst. 180, nom. *Morris* and *Maule*.

(*y*) *Doe* d. *Hayter* v. *Joinville*, 3 East, 172; and see *Doe* d. *Smith* v. *Fleming*, 2 C. M. & R. 638.

(*z*) *Greig* v. *Martin*, 5 Jur. (N.S.) 329. See however, the cases in Chap. XLII. A bequest to nephews and nieces may be void for uncertainty if it appears that the testator did not mean nephews and nieces: *M'Hugh* v. *M'Hugh* [1908] 1 Ir. R. 155.

(*a*) 2 V. & B. 367. The basis of the decision was that the gift was rendered certain by the event. *Ashburner* v. *Wilson*, 17 Sim. 204, was decided on the ground that the testator meant the first-born son.

(*b*) *Bate* v. *Amherst*, T. Raym. 82. This ground did not save the gift in *Smithwick* v. *Hayden*, 19 L. R. Ir. R. 490, from being held void: there the gift was to "any" female relative who married in accordance with the provisions of the will.

(*c*) *Powell* v. *Davies*, 1 Bea. 532; *Ashburner* v. *Wilson*, 17 Sim. 204; *Wilson* v. *Wilson*, 1 De G. & S. 152.

(*d*) *Gregory* v. *Smith*, 9 Ha. 708; *Commissioners, etc.* v. *Deey*, 27 L. R. Ir. 289. As to the meaning of "family" see Chap. XLI, *post*, p. 1553.

not determined which of them to make the object of his bounty" (*e*). If, however, the gift is to "the son of my brother A," and it appears that A has two or more sons, extrinsic evidence is admissible in the first instance to show whether the testator had reasons for preferring one son, and if no such evidence is forthcoming, evidence is admissible to show which son the testator intended to benefit (*f*).

Latent ambiguity.

The same rule applies where the gift is to "John Smith," or "the children of John Smith," and there are two John Smiths known to the testator (*g*). It is, of course, assumed that there is nothing on the face of the will to show which John Smith was intended; if so there is no uncertainty. Thus, in *Healy* v. *Healy* (*h*), there was a gift to "my nephew Joseph Healy," and another gift to "Joseph Healy, only son of my brother Joseph"; the testator had two nephews named Joseph Healy, one the son of his brother James, and the other the son of his brother Joseph; it was held that the will itself showed that "my nephew Joseph Healy" meant the son of James.

Gift to class except a person not named.

Again, a gift to a class, with the exception of one person of the class, who is not named, or cannot be ascertained, is not void, but takes effect in favour of the whole class (*i*). And where a testator, after devising property to his daughter A in fee, and if she die under twenty-five without leaving any children, then over, gave other property on trust to be conveyed equally amongst "such" children of A, the context not showing what limit was intended to be put on the class of children, it was held that all took (*k*). So a gift to the testator's "aforesaid nephews and nieces," none having been previously named, was held to include all (*l*); and a bequest to the children of A, "including who the illegitimate of" A, was held, on the same principle, to be a good bequest to the legitimate children of A (*m*), but to include no illegitimate child (*n*).

Mistake in number of class.

Where a testator gives a legacy to each of the children of A, and describes them as consisting of a specified number, which is less than the actual number at the date of the will, this

(*e*) Note by Mr. Jarman (1st ed., p. 322). "No person in particular is *intended* by the will": Wigram, pl. 209.

(*f*) See *Re Jeffrey*, [1914] 1 Ch. 375, *post*, p. 499.

(*g*) *Lord Cheyney's Case*, 5 Rep. 68b; *Re Stephenson*, [1897] 1 Ch. 75, and other cases cited *post*, pp. 494 *seq.*

(*h*) Ir. R. 9 Eq. 418. Compare *Doe* v. *Morgan*, and *Doe* v. *Westlake*, stated *post*, pp. 495, 496.

(*i*) *Illingworth* v. *Cooke*, 9 Hare, 37. See *Cope* v. *Henshaw*, 35 Bea. 420.

(*k*) *Hope* v. *Potter*, 3 K. & J. 206.

(*l*) *Campbell* v. *Bouskell*, 27 Bea. 325. The word "aforesaid" was thus rejected, the M.R. preferring that course to construing the gift as made to nephews and nieces by mistake for grandchildren, who were previously named.

(*m*) *Gill* v. *Bagshaw*, L. R. 2 Eq. 746.

(*n*) *Mason* v. *Bateson*, 26 Bea. 404.

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misstatement is disregarded (*o*). The same rule is sometimes applied to other classes or descriptions of persons. Thus, in *Lee* v. *Pain* (*p*), under a bequest to the three sisters of A, the four sisters of A were held to be entitled. And where a testator bequeathed "to the surgeon and resident apothecary of the Dispensary at B," and to other persons, and amongst them the "surgeons" of other dispensaries, £19 19s. each, "or any who may hold the like situations at my decease," and it appeared that at the B dispensary there was no apothecary, but two surgeons and a dispenser, those persons were each held entitled to a legacy of the specified amount (*q*). The general principle is that "if the Court comes to the conclusion, from a study of the will, that the testator's real intention was to benefit the whole of a class, the Court should not, and will not, defeat that intention because the testator has made a mistake in the number he has attributed to that class. The Court rejects an inaccurate enumeration" (*r*).

Gift to inhabitants.

In *Rogers* v. *Thomas* (*s*) there was a bequest to "the inhabitants of Tawleaven Row in the Parish of Sethney." The Master, in answer to an inquiry, found that Tawleaven Row consisted of seven houses, entirely occupied by poor fishermen and labourers and their families; and that the inhabitants at the time of the death of the testatrix were thirty persons whom he enumerated. Held, a good bequest to these thirty persons. But if the area were large, such as bequest to the inhabitants of a town, it is submitted that the gift would be void for uncertainty.

Devise to three, "the one to be heir to the other."

As an example of a devise being void for uncertainty, Mr. Jarman cites a case (*t*) "where one having three sons, J., E., and W., and lands in three counties, devised the lands in A to J., the lands in B to E., and the lands in C to W.; and added, that if any of his said sons died, then *the one of them to be heir unto the other.* A., the eldest son, having died, the land devised to him was claimed by the other two; but the Court (the Chief Justice doubting) decided that nothing passed by the clause in question, as it was not certain what issue should have it. Some stress was laid on the fact that the original devise conferred only an estate for life.

(*o*) *Post*, p. 1682.
(*p*) 4 Ha. 249.
(*q*) *Ellis* v. *Bartrum*, 25 Bea. 109.
(*r*) *Per* Lindley, L.J., in *Re Stephenson*, [1897] 1 Ch., at p. 83.
(*s*) 2 Keen 8. The case appears to have nothing to do with the law of charities.
(*t*) First edition, p. 323, the case being *Wood* v. *Ingersole*, 1 Bulst. 61; *S. C.*, but ill-reported, Cro. Jac. 260; see also Pollexf. 482; *Hill and Baker's Case*, cited 1 Bulst. 63; and see Saville, 92, 93.

"On the other hand, where (*u*) the testator devised to his eldest son Blackacre, to his second son Whiteacre, and to his third son Greenacre, in tail; and further willed that, in case any of his said sons should die without issue, *the survivor to be each other's heir*. The eldest son died without issue; and the question was, whether one or both the surviving brothers should have Blackacre? And the Court, on the first hearing of the case, was in great doubt; but it was afterwards holden that the surviving brothers were joint tenants, and, although the word 'survivor' was in the singular number, yet, in sense, upon the whole matter it should be taken and construed as for the plural number: (survivor should be each other's heir) *i.e.*, each survivor, *i.e.*, all the survivors.

"Survivor to be each other's heir."

"An instance of a bequest held void for uncertainty on account of the vague use of the word 'survivors' occurs in a case (*x*), where the words were, 'I give to my executors the sum of £1,000 upon trust to be invested in the funds of the Bank of England, *during the lives of the survivors or survivor*, for the widows of John Sayce and Thomas Draper, to be divided between them, share and share alike.' It was contended for the two legatees that the words 'survivors or survivor' applied to the executors, and did not affect the gift to the widows, who, therefore, were absolutely entitled: but Sir J. Leach, M.R., observed that it was impossible to put any rational construction upon the bequest, which, therefore, was void for uncertainty."

Hoffman v. *Hankey*.

In *Hudson* v. *Bryant* (*y*), the testator gave his property to his wife, and in the event of it being more than she wanted to live on, desired her to give the remainder to his daughters: and directed the money to be put in some bank trust as might be thought best "for her and those in trust": it was held that there was an intestacy after the widow's death.

In *Re Hetley* (*z*) a testator appointed his wife sole executrix, and after giving her all his property for life, proceeded as follows: "And I desire and empower her by her will or in her lifetime to dispose of my estate in accordance with my wishes verbally expressed by me to her." It was held by Joyce, J., that parol evidence could not be admitted to show what the testator's verbally expressed wishes were, and that the power

Power of disposition void for uncertainty.

(*u*) *Hambledon* v. *Hambledon*, 3 Leon. 262, Cro. Eliz. 164, Owen, 25; see also Brook, title, Devise, pl. 38.

(*x*) *Hoffman* v. *Hankey*, 3 My. & K. 376. "Although the similarity of expression seemed, in some degree, to connect this with the preceding case, yet it rather belongs to the class of cases in which bequests have been held to be void on account of the uncertainty as to the extent of interest the gift was intended to comprise." (Note by Mr. Jarman.)

(*y*) 1 Coll. 681, *ante*, p. 439.

(*z*) [1902] 2 Ch. 866.

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of disposition given to the widow was void for uncertainty. The learned Judge declined to extend the doctrine illustrated by *Re Fleetwood* (*a*).

Where gift is partly charitable.

On the same principle, where property is given to trustees for purposes which are partly charitable and partly of an indefinite nature not charitable, so that the whole might be applied for either purpose, the gift is void (*b*).

Gift wholly charitable.

A gift which is wholly charitable is never void for uncertainty in the object (*c*).

Trusts which fail from uncertainty.

The rules applying to cases in which property is given to trustees upon trusts which are too uncertain to be given effect to, are discussed elsewhere (*d*).

Words of reference.

Uncertainty is sometimes caused by the use of relative pronouns or words of reference; as where a testator gave property to his wife for life and after her death to M., "niece to my said wife. Item, I give the use of £500 stock for and during her natural life": it was held on the context, that "her" referred to the wife (*e*).

A gift "amongst my relations hereafter named," where none are subsequently named, is void for uncertainty (*f*).

"The said."

The phrase "the said" generally refers to the immediate antecedent, but it is a question of construction on the whole will, and therefore if there are separate gifts to two persons each named A B, and a subsequent reference to "the said A B," this may mean the one first named, if the context so requires.

Uncertainty avoided by position of name in will.

In such a case, the position in the will of the name of the legatee may prevent uncertainty. Thus, in *Fox* v. *Collins* (*g*), where legacies were given to S. C., A. C. of St. Ives, and S. B., and then a legacy to A. C. of Hereford, and others, and the residue was given "to the said S. C., A. C., and S. B.," it was held, that under the last gift A. C. of St. Ives was entitled, partly on the ground that the word "said" applied to the three persons taken together, and that in the previous part of the will A. C. of St. Ives was named between S. C. and S. B.

Gift to several alternatively.

"Uncertainty," says Mr. Jarman (*h*), "is sometimes pro-

(*a*) 15 Ch. D. 594, *post*, p. 472.
(*b*) *Ante*, p. 219.
(*c*) *Ante*, p. 215.
(*d*) *Post*, p. 456.
(*e*) *Castledon* v. *Turner*, 3 Atk. 257.
(*f*) *Crampton* v. *Wise*, 58 L. T. 718.
(*g*) 2 Ed. 107. See also *Doe* v. *Westlake*, 4 B. & Ald. 57; *Healy* v. *Healy* Ir. R. 9 Eq. 418.
(*h*) First ed. p. 324. No authority is cited by Mr. Jarman for the proposition that a simple gift to "A or B" is void for uncertainty, nor, so far as the editor is aware, has the point ever been decided, but on principle the statement would seem to be correct. In *Longmore* v. *Broom*, 7 Ves. 124,

duced by the mention of several objects alternatively, as in the case of a gift to A *or* B (*i*).

"In the early case of *Beal* v. *Wyman* (*k*), where a question arose on these words, *viz.*, 'I give and bequeath one half of my lands to my wife, and, after her death, I give all my lands to the heirs males of any of my sons *or* next-of-kin'; it was contended that the words 'heirs males of any' of his sons were words certain enough to create an estate, for it was all one as if he had said, 'to the heirs males of all his sons, if they have heirs males, or to those who have heirs males (*l*)'; and the words, 'or to the next-of-kin,' were also certain enough, being joined with the preceding words, and should be meant to the next-of-kin and their heirs males, if his sons had no heirs males: for in a will, if there be words to express the meaning of a testator, it is sufficient, though the words be not apt. On the other side, it was argued that this devise was void; for it appeared not what heir male should have the land, whether the heir male of his son, or the heir male of his next-of-kin, for the words were disjunctive; and the Court seems to have inclined to this opinion, but how the case was ultimately disposed of does not appear.

To "heirs males of any of my sons or next-of-kin."

"So, in *Lowndes* v. *Stone* (*m*), where a testator, by an unattested will, gave the remainder of his estate to his next-

To "next-of-kin or heir-at-law."

Grant, M.R., said: "You must make some addition to the bequest: otherwise it would be void for uncertainty. A bequest to A or B is void; but a bequest to A or B at the discretion of C is good, for he may divide it between them." *Post*, Chap. XVI. And in *Re Sibley's Trusts* (5 Ch. D. 494), Jessel, M.R., said: "There are authorities which show that when you find a gift in a will to A or B that word 'or' is to have some meaning, and it is to have a meaning which depends upon what A or B really consists of. You cannot lay down *a priori* that the gift to A or B has any particular meaning; you must first of all know what A and B are." But the M.R. did not here have in mind the case of a simple gift to two individuals in the alternative. According to the civil law the rule appears to have been the other way: see *Carey* v. *Carey*, 6 Ir. Ch. R. 255 (*post*, p. 452). In *In b. Bradford*, 72 L. T. 267, effect was given to an appointment of "B or F" as executors, on the theory that the testator intended to appoint "B, or him failing, F."

(*i*) "In the case of a gift to several persons alternatively, there is a fatal uncertainty unless the secondly named person can be considered as intended to be substituted for the first in some event, or unless the word 'or' can be changed into 'and,' which has been often *vexata quæstio*. (See Chap. [XVIII]).'' (Note by Mr. Jarman.)

(*k*) Styles, 240, 2 Danv. 514, pl. 4; and see *Marwood* v. *Darrel*, Lee's Ca. t. Hard. 91.

(*l*) "Such, it is probable, would now be held to be the construction of this devise. The other question, on the words 'sons *or* next-of-kin,' is more difficult. Probably they would be constructed as meaning 'my sons, or such other persons as may happen to be my next-of-kin.'" (Note by Mr. Jarman.)

(*m*) 4 Ves. 649. And see 7 Sim. 363. Lord Loughborough's expressions are hardly reconcileable with the notion (2 K. & J. 735) that he construed the words as implying heirship according to the nature of the property, and as intimating an intention that the rule of the statute should prevail. According to Jessel, M.R., the decision turned on the use of the word "heir-at-law" in the singular: *Re Thompson's Trusts*, 9 Ch. D. 607, *post*, p. 453.

of-kin *or* heir-at-law. The personalty was claimed by the next-of-kin and the heir respectively; the latter contending that the testator used the term 'heir-at-law' as explanatory of the former expression, meaning 'such next-of-kin as shall be my heir-at-law.' Lord Loughborough, 'You have a fair retort upon each other. On the one side it is contended that "next-of-kin" means "heir-at-law"; on the other, that "heir-at-law" means "next-of-kin." It must be distributed according to the statute.'

To A "or his heirs, executors, administrators, or assigns."

"Again, in *Waite* v. *Templer* (*n*), where a testator, resident in India, bequeathed a share of his personalty to A, 'who resided at L when I left England, *or* to his heirs, executors, administrators, or assigns for ever'; Sir L. Shadwell, V.-C., held that A, having died in the testator's lifetime, the legacy failed, his Honor being of opinion that the additional words were too uncertain to create a substitutional gift."

Substitutional gift created by word "or."

There are, however, several cases in which "or" has had the effect of making the latter branch of a gift substitutional.

Thus, in *Carey* v. *Carey* (*o*), a testator directed that a certain fund should be distributed share and share alike between his son R and his nephew E or his nephew P; it was held that "or" could not be read "and," but that it imported substitution, namely that P was only to take in the event of E's death; consequently E having survived the testator, the fund went in equal moieties to R and E. The earlier part of the will contained a devise of real estate to R, and in case he died under twenty-one then to E, and in case he died under twenty-one then to P, but this does not seem to have influenced the decision.

The question whether "or" imports substitution arises most frequently in cases where the latter part of the gift is in favour of a class of persons related to the original devisee or legatee, such as "issue," "children," "heirs"; as, for example, where the gift is "to A or his issue," or "to A or in case of his death to his issue." The tendency of the modern cases is to construe such a gift as intended to substitute the issue for the original devisee or legatee in the event of the latter dying in the testator's lifetime (*p*).

(*n*) 2 Sim. 524; see also *Stone* v. *Evans*, 2 Atk. 86; *Grafftey* v. *Humpage*, 1 Bea. 46, *post*, p. 1591. *Waite* v. *Templer* was approved by Lord Brougham in *Gittings* v. *M'Dermott*, 2 My. & K. 69, but disapproved of by Lord St. Leonards, 3 H. L. C. 557.

(*o*) 6 Ir. Ch. Rep. 255.

(*p*) *Montagu* v. *Nucella*, 1 Russ. 165; *Turner* v. *Moor*, 6 Ves. 557; *Re Coley*, [1901] 1 Ch. 40; *Re Roberts*, [1903] 2 Ch. 200, and other cases referred to *post*, pp 1287 *seq.*

Limitations of rule as to construction of "or."

In *Re Delmar Charitable Trust* (*q*), Stirling, J., doubted the accuracy of the general proposition that a gift in a will to A or B is *prima facie* to be treated as a substitutional gift to B in case A cannot take the benefit which is intended for him. "Undoubtedly," said the learned Judge, "there are many cases in which it has been decided that a gift to A or B is substitutional, and that conclusion has been arrived at more particularly in cases where the gift is in favour of A or his children. A typical example is the case of *Carey* v. *Carey* (*r*) which was referred to in the argument, and which I have carefully considered since; but that case (and as it appears to me all the others which I have examined), was decided on a consideration of the whole will, and all the circumstances which can be taken into consideration upon the construction of a will."

Synonymous construction of "or."

Sometimes "or" is used by a testator to show that he uses two phrases to mean the same thing. Thus, in *Re Thompson's Trusts* (*s*), where after a life estate to A, a testatrix directed her real and personal estate to be sold, and the proceeds paid, "one-third to the heirs or next-of-kin of B deceased, one-third to the heirs or next-of-kin of C deceased, one-third to the heirs or next-of-kin of D deceased"; Jessel, M.R., held that the testatrix meant not to make an alternative gift, but that the terms "next-of-kin" and "heirs" should apply to one class; consequently the statutory next-of-kin were entitled (*t*).

Reference to uses of other estates, there being more than one.

Uncertainty sometimes arises from property being devised to the same uses as the testator's "other" estates, of which there are several, that are devised to different uses (*u*). It may also be occasioned by the testator's apparent misapprehension of the law regulating the devolution of property; as in *Thomas* v. *Thomas* (*x*), where a testator, after charging his real and personal estate with the payment of his debts, and giving it to his wife during widowhood, after her decease or marriage willed that all his real and personal estate "be divided according to the statute of distribution in that case made and provided"; and it was held that the real estate did not pass to the next-of-kin under this clause, the Court thinking it not clear that the testator intended the real estate to be distributed according

(*q*) [1897] 2 Ch. 163. As to the so-called "alternative" construction of the word "or" which was adopted in this case, see *post*, p. 1284.

(*r*) *Ante*, p. 452.

(*s*) 9 Ch. D. 607.

(*t*) As to the construction of the word "heirs" when used in gifts of personal estate, see Chap. XL.

(*u*) *Leslie* v. *Duke of Devonshire*, 2 Br. C. C. 187; *Re Buckly*, 8 T. L. R. 181. See *Re Smith*, 45 L. T. 246. The extreme complication of the beneficial trusts declared by a testator does not prevent the legal estate from passing to the trustees: *Barclay* v. *Collett*, 6 Scott, 408.

(*x*) 3 B. & Cr. 825.

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to the statutes of distribution regarding personalty, but that he must have referred to some statute which he supposed applied to real estate.

No objection that beneficiary is to be ascertained by future act of testator.

Stubbs v. *Sargon.*

"*Id certum est quod certum reddi potest*," Mr. Jarman remarks (*y*), "is a rule no less applicable to the *objects* than (as we have seen) it is to the *subjects* of disposition; and, therefore, it is no objection to a gift that it is so framed as to make the objects dependent upon some extrinsic circumstance, though it be an act performed, or even *to be* performed, by the testator himself in his lifetime. As in *Stubbs* v. *Sargon* (*z*), where a testatrix directed her trustees to dispose of and divide the proceeds of certain property unto and amongst her partners, who should be in co-partnership with her at the time of her decease, or to whom she might have disposed of her said business, in such shares and proportions as her said trustees should think fit and deem advisable. It was objected that the gift was void for uncertainty; but it appearing that the testatrix was, at the date of her will, in partnership with certain persons, to some of whom, conjunctively with another person, she, on the dissolution of such partnership, disposed of her business, Lord Langdale, M.R., [and on appeal, Lord Cottenham,] held that these latter persons were those among whom the trustees were to divide the property in such shares as they might deem advisable."

How far discretion may be given to trustees.

Another illustration of the same principle is to be found in the case of a trust for a class of persons which is valid, although the shares and interests which they are to take are left to the discretion of the trustees (*a*). But the class must be limited or defined in some way, for if property is given to trustees to be distributed or disposed of in such manner as they think fit, this is a discretion which cannot be controlled by the Court, and there is a resulting trust for the persons entitled in default of disposition. The trustees cannot take beneficially, because the form of the gift implies that they are to exercise their discretion for the benefit of other persons (*b*).

Gift to several successively, not saying in what order.

Mr. Jarman continues (*c*): "In many cases devises to several persons successively have been contended to be void on account

(*y*) First edition, p. 326.

(*z*) 2 Kee. 258; 3 My. & Cr. 507, *post*, p. 456.

(*a*) See the cases on discretionary trusts, cited in Chap. XXIV; and such cases as *Re Conn*, [1898] 1 Ir. 337, *ante*, p. 434.

(*b*) See *Stubbs* v. *Sargon*, *Fowler* v. *Garlike*, *Corporation of Gloucester* v. *Wood*, and other cases, cited *post*, pp. 456 *seq.*

(*c*) First edition, p. 327.

of the uncertainty respecting the order in which the objects are to take (*d*). Where the devise is to several specified individuals in succession, the obvious rule is, to hold them to be entitled in the order in which their names occur. If it be to a class of persons (constituted such in virtue of birth (*e*)), as to children, sons, or brothers (*f*), then priority according to seniority of age may be presumed to be intended (*g*). And the circumstance of a condition being imposed on the devisees has been held not to vary the order in which they are successively entitled.

"Thus, where (*h*) a testator devised to A and his brothers successively, but not to be entered on or enjoyed until one month after their marriages, it was held that the devise was not (as contended) void for uncertainty; for as the testator named A first, *who was the eldest* son, the word 'successively' implied that the estate was to go to his next brother after him; and the Court agreed that the clause about marriage made no alteration in the exposition of the will, but only added a restriction to the devise, which before was general; and, therefore, if the second son had married before the eldest, yet he could not have taken.'"

On the other hand, in *Thomason* v. *Moses* (*i*) where the bequest was of the interest of a sum of money to the testator's father for life, then to his brother for life, and then to be continued to the testator's next nearest heir, and so on, and neither the father nor the brother was the testator's heir, the gift of the fund after the death of the brother was held void for uncertainty.

Where intended object cannot be identified, gift is void for uncertainty.

It must be remembered that with respect to charities gifts may be good, which, with respect to individuals, would be void. We have seen that charitable bequests are not void for uncertainty in the object (*k*); and where there are two charities of the same name, the legacy will be divided between them, or administered *cy-près*, if it cannot be ascertained which was the intended

(*d*) See an instance of a limitation in a deed held to be void on account of uncertainty of this nature, *Windsmore* v. *Hobart*, Hob. 313.

(*e*) "This qualification, though it may sound strangely, seems requisite in order to exclude from the position in the text gifts to some other classes, such as executors." (Note by Mr. Jarman in the first edition.)

(*f*) *Ongley* v. *Peale*, 2 Ld. Raym. 1312; 2 Eq. Ca. Ab. 358, pl. 8; *Young* v. *Sheppard*, 10 Bea. 207.

(*g*) See *Eastwood* v. *Lockwood*, L. R. 3 Eq. 487, 495, where "next survivor according to seniority" was held on the context to mean next younger; and *Crofts* v. *Beamish*, [1905] 2 Ir. 349.

(*h*) *Ongley* v. *Peale*, 2 Ld. Raym. 1312, *supra*.

(*i*) 5 Bea. 77. See *Prestwidge* v. *Groombridge*, 6 Sim. 171, where effect was given to an extremely vague gift in favour of the testatrix's nephews in order of seniority.

(*k*) *Ante*, p. 215. It will be remembered that a gift for several purposes may be void for uncertainty, although some of the purposes are charitable: *ante*, p. 219.

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object (*l*). In the case of individuals, the gift would be void for uncertainty. The rule has occasionally been disregarded. Thus, in *Hare* v. *Cartridge* (*m*), the gift was "to my first cousins, the children of my father's brother of the name of Cartridge"; the father had two brothers of the name of Cartridge, both of whom had children, and the gift was held by Shadwell, V.-C., to take effect in favour of the children of both brothers, apparently on the ground that the testator had shown an intention to benefit all his first cousins on the father's side, and that consequently the words "the children of my father's brother" were surplusage. As was remarked in the third edition of this work (*n*): "the decision seems opposed to all the other authorities on this subject." It was disapproved by the Court of Appeal in *Re Stephenson* (*o*). There the testator gave his property "unto the children of the deceased son (named Bamber) of my father's sister share and share alike." There were three deceased sons, all named Bamber, of the sister of the testator's father, and this fact was known to the testator; it was held that the gift was void for uncertainty.

Parol evidence.

Where a testator gives property to a person by a particular name or description, and it is found that there were at the date of the will two persons answering to that name or description, parol evidence is admissible to show which of them was intended (*p*).

Effect where trust created, but object uncertain.

IV. Trusts and Powers.—With regard to trusts, the general rule is thus stated by Mr. Jarman (*q*): "Sometimes a testator distinctly shows an intention to create a trust, but does not go on to denote with sufficient clearness who are to be its objects; the effect of which obviously is, that the devisees or legatees in trust (whom we suppose to be distinctly pointed out) hold the property for the benefit of the person or persons on whom the law, in the absence of disposition, casts it; in other words, the gift takes effect with respect to the legal interest, but fails as to the beneficial ownership.

"As in *Stubbs* v. *Sargon* (*r*), where a testatrix indorsed a

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(*l*) *Waller* v. *Childs*, Amb. 524; *Bennett* v. *Hayter*, 2 Bea. 81; *Simon* v. *Barber*, 5 Russ. 112; *Re Clergy Society*, 2 K. & J. 615; *Re Alchin's Trusts*, L. R. 14 Eq. 230; *Re Barnard*, 7 T. L. R. 73.

(*m*) 13 Sim. 167.

(*n*) By Messrs. Wolstenholme and Vincent, p. 348.

(*o*) [1897] 1 Ch. 75. It seems that evidence of intention would have been admissible: see *Estate of Hubbuck*, [1905] P. 129; *post*, p. 499.

(*p*) *Post*, pp. 494 *seq.*

(*q*) First edition, p. 333.

(*r*) 2 Kee. 255; 3 My. & Cr. 507. See also *Harland* v. *Trigg*, 1 Br. C. C. 142; *Doe* v. *Joinville*, 3 East, 172; *Robinson* v. *Waddelow*, 8 Sim. 134, stated *post*, p. 1554. See *Briggs* v. *Penny*, 3 Mac. & G. 546, *post*, pp. 856, 886.

Stubbs v. *Sargon.*

promissory note for £2,000 to Mrs. Sargon, which she accompanied with a letter, declaring the note to have been given to Mrs. Sargon for her sole use and benefit, independent of her husband, for the express purpose of enabling her to present to *either branch of her* (the testatrix's) *family* any portion of the principal or interest, as she might consider the most prudent; and, in the event of the death of Mrs. Sargon, by that bequest the testatrix empowered her to dispose of the said sum and interest by deed or will to those or either branch of her family she might consider most deserving; and that to enable her (Mrs. Sargon) to have the sole use and power of the said sum of £2,000 due by the above note of hand, she had specially indorsed the same in her favour. Lord Langdale, M.R., was of opinion, that the promissory note was not indorsed and delivered to Mrs. Sargon for her own absolute use, but for the purpose of the money secured by it being disposed of by her to such parts or members of the testatrix's family as were intended to be thereby designated. Unfortunately, the letter was so expressed, that the objects could not be ascertained; and the trust being too indefinite for the Court to act upon, the £2,000 must be treated as part of the testatrix's personal estate. On appeal, Lord Cottenham was of the same opinion " (*s*).

Corporation of Gloucester v. *Wood.*

In *Corporation of Gloucester* v. *Wood* (*t*), one of several testamentary papers contained the following words: " In a codicil to my will, I gave to the corporation of Gloucester £140,000. In this I wish that my executors would give £60,000 more to them for the same purpose as I have before named." No codicil or testamentary paper containing any gift to the corporation could be found; and it was decided by Sir J. Wigram that neither legacy could be supported as a gift to the corporation for their own use (though he admitted that a gift to A " for a purpose " may sometimes be equivalent to a gift to A absolutely), nor as a general charitable legacy (though it was improbable that a corporation was intended to hold in trust for a private person); the purposes of the gift were therefore uncertain, and the corporation were trustees for the residuary legatees. This decision was affirmed in the House of Lords (*u*).

So if the gift be expressly " in trust," though to be disposed of in such manner and for such purposes as the donees think fit, they are trustees, and the beneficial interest results to the heir or next-of-kin (*x*); and a gift " to be expended and appropriated

(*s*) 3 My. & Cr. 507.
(*t*) 3 Hare, 131.
(*u*) 1 H. L. Ca. 272, and see *Aston* v. *Wood*, L. R. 6 Eq. 419.
(*x*) *Fowler* v. *Garlike*, 1 R. & My. 232. See also *Buckle* v. *Bristow*, 10 Jur. (N.S.) 1095.

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Where gift in trust though discretional.

in such manner as the donees, or a majority of them, shall in their discretion agree upon," without the words "in trust," would probably produce the same result (*y*).

At his own disposal.

A gift of the residue to the executor to be "at his own disposal" gives the residue to the executor beneficially (*z*); but a gift to be applied for charitable objects as the executor may in his discretion select and to be at his own disposal does not give the residue to the executor beneficially (*a*).

In *Buckley* v. *Buckley* (*b*), a gift of residue to trustees to be applied "to meet contingencies which may be caused by vacancies, repairs, or casualties in my family," was held void for uncertainty.

In *Att.-Gen.* v. *National Provincial Bank* (*c*), Lord Haldane said "a man cannot disinherit his heirs by giving away his property unless he really gives it away; he cannot leave it to some one else to make a will for him, nor can he leave it to his trustees to give it for purposes which are to be completely in their discretion, unless these purposes are so indicated as in some sense to confer on a class of beneficiary an interest." But a general power of appointment may be given, for that is equivalent to property, and a power of distribution among charities may be given (*d*).

Precatory and undefined trusts.

The question of uncertainty often arises in connection with precatory trusts, and trusts without definite objects, both of which topics are considered in another chapter (*e*). It may however be useful to notice some distinctions which have been drawn.

Uncertainty in subject.

1. A testator may express a clear intention to create a trust, and yet his intention may fail to take effect, because he has not defined the subject-matter of the trust with sufficient certainty (*f*).

Uncertainty in subject and object.

2. "Wherever the subject to be administered as trust-property, and the objects for whose benefit it is to be administered, are to be found in a will not expressly creating trust, the indefinite nature and *quantum* of the subject, and the

(*y*) *Per* Wood, V.-C., *Buckle* v. *Bristow*, *supra*; *Re Booth*, 116 L. T. 464. The doctrine laid down by Sir W. Grant in *Gibbs* v. *Rumsey*, 2 V. & B. 294, is erroneous: see *Ellis* v. *Selby*, 1 Myl. & C. 294; *Buckle* v. *Bristow*, *supra*; *Yeap Cheah Neo* v. *Ong Cheng Neo*, L. R. 6 P. C. 381; *Fenton* v. *Nevin*, 31 L. R. Ir. 478.

(*z*) *Re Howell*, [1915] 1 Ch. 241.

(*a*) *Re Chapman*, [1922] 2 Ch. 479, the executor took as trustee for the next-of-kin.

(*b*) 19 L. R. Ir. 544.

(*c*) [1924] A. C. 262, at p. 268.

(*d*) *Re Hughes*, [1921] 2 Ch. 208, at p. 212.

(*e*) Chap. XXIV.

(*f*) *Abraham* v. *Alman*, 1 Russ. 509; *Lechmere* v. *Lavie*, 2 My. & K. 197; *Horwood* v. *West*, 1 Sim. & St. 387; *Ex p. Payne*, 2 Y. & C. 636. Some of the cases referred to in the earlier part of this chapter (*ante*, pp. 430 *seq.*) were decided on this ground.

indefinite nature of the objects, are always used by the Court as evidence that the mind of the testator was not to create a trust" (*g*).

Where object only is uncertain.

3. A testator may show an intention, either by mandatory or precatory words, that a person to whom he has given property by his will is to hold it upon trust for objects who are not ascertained; in such a case, although the intention of the testator cannot be carried out, yet the trust is not without effect. "Suppose, for instance, that by the precatory words in the will, the donee is requested to apply property, the amount of which is ascertained, 'for the benefit of——,' . . . there would be uncertainty enough as to the object, and yet such a trust would be created as would effectually exclude the donee from applying the property to his own use" (*h*). The effect of such a trust is considered in another chapter (*i*).

Powers.

With regard to powers, the question of uncertainty arises chiefly in those cases where a person is empowered to appoint property among the "family" or "relations" of a person; the decisions on this point are referred to in the chapter on Powers (*j*). A power may also be void for uncertainty because the objects are not defined at all (*k*).

(*g*) *Per* Lord Eldon in *Morice* v. *Bishop of Durham*, 10 Ves., at p. 536; *Harland* v. *Trigg*, 1 Br. C. C. 142; *Knight* v. *Boughton*, 11 Cl. & F. 513; *per* Bowen, L.J., in *Re Diggles*, 39 Ch. D. 257, cited *post*, p. 853. The scope of the doctrine was examined by Wood, V.-C., in *Bernard* v. *Minshull*, John. 276.

(*h*) *Per* Wood, V.-C., in *Bernard* v. *Minshull*, John., at p. 286.

(*i*) Chap. XXI.

(*j*) Chap. XXIII. See also *Harland* v. *Trigg*, 1 Bro. C. C. 142, *post*, p. 1553; *Williams* v. *Williams*, 1 Sim. (N.S.) 358, *post*, p. 1556.

(*k*) *Re Hetley*, [1902] 2 Ch. 866, referred to *post*, p. 769, and *ante*, p. 449.

CHAPTER XV.

PAROL EVIDENCE, HOW FAR ADMISSIBLE.

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Parol evidence inadmissible to control will.

I. Inadmissible to explain Contents of Will.—" As the law requires wills both of real and personal estate (with an inconsiderable exception (*a*)) to be in writing, it cannot, consistently with this doctrine, permit parol evidence to be adduced, either to contradict, add to, or explain the contents of such will; and the principle of this rule evidently demands an inflexible adherence to it, even where the consequence is the partial or total failure of the testator's intended disposition; for it would have been of little avail to require that a will *ab origine* should be in writing, or to fence a testator round with a guard of attesting witnesses, if, when the written instrument failed to make a full and explicit disclosure of his scheme of disposition, its deficiencies might be supplied, or its inaccuracies corrected, from extrinsic sources. No principle connected with the law of wills is more firmly established or more familiar in its application than this; and it seems to have been acted upon by the Judges, as well of early as of later times, with a cordiality and steadiness which show how entirely it coincided with their own views. Indeed, it was rather to have been expected that judicial experience should have the effect of impressing a strong conviction of the evil of offering temptation to perjury " (*b*).

There are numerous cases in which the Courts have refused to admit parol evidence to contradict the express terms of a

(*a*) *Ante*, p. 88.

(*b*) First edition, p. 349. Mr. Jarman, it is clear, would not have approved the decision in *Re Fleetwood*, *post*, p. 472.

will (*c*). But where a will contains an erroneous recital or statement of fact, parol evidence is sometimes admissible to contradict it (*d*).

The application of the general principle stated by Mr. Jarman was much discussed in the case of *Higgins* v. *Dawson* (*e*), where it was contended that parol evidence of the state of the testator's property, at the time he made his will, was admissible to explain what he meant by the words which in themselves were unambiguous, and capable of being construed without extrinsic aid. The evidence was therefore disregarded. The decision proceeded on the fundamental distinction between evidence simply explanatory of the words of the will themselves (as in *Fonnereau* v. *Poyntz* (*f*), *Colpoys* v. *Colpoys* (*g*), and other cases cited in a subsequent part of this chapter (*h*)), and evidence sought to be applied to prove intention itself as an independent fact.

On the same principle, evidence was not admissible, under the old law, to prove that a testator's personal property was insufficient to satisfy the dispositions of his will, and thus to show an intention on his part to exercise a general power of appointment (*i*).

Letters and oral declarations of testator rejected.

Among the older cases cited by Mr. Jarman in support of the general proposition laid down by him is *Strode* v. *Lady Falkland* (*k*); letters and oral declarations of the testator being offered to prove the intention to include a reversion in the words, "All other my lands, tenements, and hereditaments, out of settlement," it was unanimously agreed by Lord Cowper, C.J., Trevor, M.R., T. Trevor, C.J., and Tracy, J., that this kind of evidence could not be admitted, for that where a will was doubtful and uncertain, it must receive its construction from the words of the will itself; and no parol proof or declaration ought to be admitted out of the will to ascertain it.

(*c*) *Hampshire* v. *Peirce*, 2 Ves. sen. 216; *Lowfield* v. *Stoneham*, 2 Stra. 1261; *Horwood* v. *Griffith*, 4 D. M. & G. 708; *Barrs* v. *Fewkes*, 34 L. J. Ch. 522; *Smith* v. *Conder*, 9 Ch. D. 170 (cited *post*, p. 476); *Re Aird's Estate*, 12 Ch. D. 291 (*post*, p. 533); Wigram on Wills, 5; *Re Boyd*, 63 L. T. 92.

(*d*) See *Re Taylor's Estate*, 22 Ch. D. 495; *Re Kelsey*, [1905] 2 Ch. 465. These cases are stated *post*, pp. 533, 534.

(*e*) *Re Grainger*, [1900] 2 Ch. 756; [1902] A. C. 1, stated *post*, p. 483. See also *Grealey* v. *Sampson*, [1917] 1 Ir. 287.

(*f*) 1 Bro. C. C. 472.

(*g*) Jac. 451.

(*h*) *Post*, pp. 483, 492. See also *Re Glassington*, [1906] W. N. 128.

(*i*) See *Andrews* v. *Emmot*, 2 Br. C. C. 297, and other cases cited in Chap. XXIII.

(*k*) 3 Ch. Rep. 98. See also *Cheyney's Case*, 5 Rep. 68; *Vernon's Case*, 4 Rep. 4; *Lawrence* v. *Dodwell*, 1 Ld. Raym. 438; *Bertie* v. *Falkland*, 1 Salk. 231; *Towers* v. *Moor*, 2 Vern. 98; *Bennet* v. *Davis*, 2 P. W. 316; *Parsons* v. *Lanoe*, 1 Ves. 189; *Ulrich* v. *Litchfield*, 2 Atk. 374; *Parmiter* v. *Parmiter*, 1 J. & H. 135.

CHAPTER XV.

Evidence of mistake by person who drew the will rejected.

So, in *Brown* v. *Selwin* (*l*) (which is a leading authority), where the testator having bequeathed the residue of his personal estate to two persons, whom he appointed his executors, and one of whom was indebted to him by bond, it was attempted to be proved by the evidence of the person who drew the will, that he received the testator's written instructions to release the bond debt by the will, but that he refused to do so, under the impression that the appointment of the obligor to be one of the executors extinguished the debt: Lord Talbot held the evidence to be inadmissible; and his decree was affirmed in the House of Lords.

Evidence of forgiveness of a debt to executor.

But a distinction has been established between such cases as *Selwin* v. *Brown*, and cases where the testator has, during his lifetime, independently of his will, shown an intention to forgive a debt due to him by an executor. In such cases evidence of such intention is admissible and can rebut any claim in equity, for the debt has gone at law (*m*). This principle extends to other gifts of personal property (*n*); but there must be a continuing intention that the gift should have been given at the time it was given (*o*).

Parol evidence of mistake.

It is explained elsewhere that if, by the mistake of the person who prepares or copies the will, a particular clause is inserted contrary to the intention of the testator, and his attention is not drawn to it, evidence of the fact is admissible, and if it is proved, the passage may be omitted from the probate (*p*). If, however, the testator knows the contents of his will, and erroneously supposes that it will not have the effect which the law gives it, the general rule applies, and evidence of his real intention is not admissible (*q*).

Devise inadvertently omitted cannot be supplied.

Mr. Jarman continues (*r*): "*A fortiori*, parol evidence is not admissible to supply any clause or word which may have been inadvertently omitted by the person drawing or copying the will.

"Thus, in the much discussed case of *The Earl of Newburgh* v.

(*l*) Cas. t. Talb. 240, *S. C. sub nom. Selwin* v. *Brown*, 3 B. P. C. Toml. 607.

(*m*) *Strong* v. *Bird*, L. R. 18 Eq. 315; *Re Applebee*, [1891] 3 Ch. 422; *Re Pink*, [1912] 1 Ch. 528; *Re Goff*, 111 L. T. 34. See also *Jenkins* v. *Jenkins*, [1928] 2 K. B. 501.

(*n*) *Re Stewart*, [1908] 2 Ch. 251; *Re Griffin*, [1899] 1 Ch. 408.

(*o*) *Re Innes*, [1910] 1 Ch. 188; *Re Pink*, [1912] 1 Ch. 528, at p. 538. This intention to forgive should be communicated to the debtor: *Re Hyslop*, [1894] 3 Ch. 522.

(*p*) *Ante*, p. 32, and *post*, p. 469. So if the will is wrongly dated the error may be corrected: *Reffell* v. *Reffell*, L. R. 1 P. & D. 139.

(*q*) In the editions of this work before the last the leading case in support of the proposition stated in the text (*Walpole* v. *Cholmondeley*, 7 T. R. 138; *S. C. Lord Walpole* v. *Lord Orford*, 3 Ves. 402) is discussed at length. The general principle is so well settled that it does not seem necessary to reprint Mr. Jarman's observations.

(*r*) First edition, p. 353.

Countess of Newburgh (*s*), where a testator gave instructions to his solicitor to prepare a will, by which his wife was to take an estate for life in lands in the counties of Sussex and Gloucester. The solicitor prepared the draft, and laid it before a conveyancer to settle, by whom it appeared that the word 'Gloucester' had inadvertently been struck out, and the person who made the fair copy of the settled draft changed the word 'counties' into 'county'; and the will, therefore, omitted altogether the estate for life in the lands in the county of Gloucester. When the will was executed, the abstract of the will (which agreed with the instructions given by the testator), and not the will itself, was read to the testator, so that the mistake remained undiscovered. The widow filed a bill, praying to have the will corrected on this evidence; but Sir J. Leach, V.-C., refused it, because, admitting it to be clearly made out that the mistake existed, the Court had no authority to correct the will according to the intention. The will, executed with that omission, was certainly not the will of the devisor; and so it must be found by a jury upon the facts stated as to the Gloucester estate; but the Court could not, for that reason, set up the intention of the testator, which by mistake he had been prevented from carrying into execution, as if he had actually executed that intention in the forms prescribed by the Statute of Frauds. To assume such a jurisdiction would, in effect, be to repeal the Statute of Frauds in all cases where a testator failed to comply with the statute by mistake or accident. His Honor added, that he was willing to direct an issue, whether this was the will of the testator as to the Gloucester estate; and upon this issue the evidence tendered would be admissible (*t*).

(*s*) "5 Mad. 364. In *Langston* v. *Langston*, 8 Bli. 167; 2 Cl. & Fin. 194, a nice question of construction arose, in consequence of the omission of a line by the person copying the will for signature; and Lord Brougham called for and inspected the draft, with a view of informing himself of this fact, in spite of the protestations of the appellant's counsel. Its inadmissibility, however, was admitted by his Lordship, who, in his judgment, emphatically disclaimed all reliance on or influence from the information derived from this source. Perhaps, however, the principle which excludes such evidence was somewhat infringed by the inspection of the draft will, even with the disclaimer; for in such cases who can venture to affirm that his mind has not received a bias, by allowing the inadmissible evidence to have access to it?" (Note by Mr. Jarman.)

The principle laid down in *Newburgh* v. *Newburgh* was acted on in *Sullivan* v. *Sullivan*, Ir. R. 4 Eq. 457 (probate case). See also *Re Haygarth*, [1913] 2 Ch., at p. 15.

(*t*) Mr. Jarman here interpolates the following remark in parenthesis: "The reporter states that a case was cited at the bar, on the authority of Lord C. B. Richards, in which Lord Eldon had sent it to the jury upon the same description of facts." But Lord St. Leonards says (Law of Prop. 207) it could not be maintained that the omission of the word "Gloucester" in the particular devise would render the whole will void as to the Gloucester estate: because although the will did not contain all that the testator intended as to this estate, it contained in the actual devise of it nothing but what he did intend. The case was ultimately decided in D. P. upon the construction of what still appeared on the face of the will. Law of Prop., p. 367.

No such issue was asked. The case was afterwards reheard before the V.-C., when it was suggested, on the result of the conveyancer's evidence, that there was no omission in the will, but that the error was owing to the introduction of a passage which he had at first written, but afterwards struck through with a pen; but which had been copied by mistake in the fair will; and it was contended, therefore, that there ought to be an issue, to try whether those words so introduced by mistake were part of the will. The V.-C. thought that, if such a case had been originally made, they would have been entitled to such an issue (*u*); but that, as it was opposed to the allegations on the record, he could not entertain it. The case was carried to the House of Lords, where the question, whether parol evidence was admissible to prove such mistake, for the purpose of correcting the will and entitling the appellant to the Gloucester estate, as if the word 'Gloucester' had been inserted in the will, was submitted to the Judges, who declared their unanimous opinion to be, that the evidence was not admissible" (*x*).

Construction not to be influenced by parol evidence of actual intention.

"It is clear," continues Mr. Jarman (*y*), "that parol evidence of the actual intention of a testator is inadmissible for the purpose of controlling or influencing the construction of the written will, the language of which must be interpreted according to its proper acceptation, or with as near an approach to that acceptation as the context of the instrument and the state of the circumstances existing at the time of its execution (which, as we shall presently see, forms a proper subject of inquiry), will admit of. No word or phrase in the will can be diverted from its appropriate subject or object by extrinsic evidence, showing that the testator commonly (*z*), or, on that particular occasion (*a*), used the words

(*u*) See as to the distinction here suggested, *infra*. Upon this Lord St. Leonards remarks: "This is a dangerous jurisdiction: for although no doubt the striking out of the two lines would have made the will what the testator directed, yet those lines, though inaccurate, were introduced in order to carry the instructions for the will into legal operation. It might on the same ground be contended that a mistake in a legal limitation made through carelessness or ignorance could be corrected by striking out the words improperly introduced." Law of Prop., p. 197. See also *Harter* v. *Harter*, L. R. 3 P. & D. 11; *In b. Davy*, 1 Sw. & Tr. 262; 29 L. J. Prob. 161; 5 Jur. (N.S.) 252; *Rhodes* v. *Rhodes*, 7 A. C. (P. C.) 192. Moreover the effect of striking out the words in *Newburgh* v. *Newburgh*, would be the opposite of that in the decided cases: it would create a devise and not an intestacy. *Per* Sir J. Wigram, Wills, pl. 183, n. And see *Stanley* v. *Stanley*, 2 J. & H. 502.

(*x*) 1 M. & Sc. 352. See *Wade* v. *Nazer*, 12 Jur. 188.

(*y*) First edition, p. 358.

(*z*) See *per* Parke, B., *Shore* v. *Wilson*, 9 Cl. & Fin. 558; *Crosley* v. *Clare*, 3 Sw. 320, n.; *Millard* v. *Bailey*, L. R. 1 Eq. 378.

(*a*) *Mounsey* v. *Blamire*, 4 Russ. 384; *Green* v. *Howard*, 1 Br. C. C. 31; *Strode* v. *Russell*, 2 Vern. 625; *Barrow* v. *Methold*, 1 Jur. (N.S.) 994. *Knight* v. *Knight*, 2 Giff. 616, is *contra*; but the rule as stated in the text is firmly settled. *Lee* v. *Pain*, 4 Hare, 251, *post*; *Douglas* v. *Fellows*, Kay, 118; *National Society for the Prevention of Cruelty to Children* v. *Scottish National Society for the Prevention of Cruelty to Children*, [1915] A. C. 207.

or phrase in a sense peculiar to himself, or even in any general or popular sense, as distinguished from its strict and primary import."

The rule as thus stated must, however, as pointed out by Mr. Jarman (*b*), be taken subject to the qualification that it "supposes the existence of an appropriate subject or object; otherwise it should seem evidence would be admissible of the testator having commonly described the object (and why not the subject also?), by the terms used in the will." Thus if a testator bequeaths a legacy to Percy the son of A B, and A B has a son named Percy, evidence is not admissible to show that the testator really intended the legacy for another son named Herbert; but if A B has no son named Percy, evidence is admissible to show that A B had a son Herbert, commonly known as "Bertie," and from that fact the Court may infer that he was the person intended by the testator (*c*). In *Barrow* v. *Methold* (*d*), a testator, being possessed of a policy of assurance in the R. A. Company for £1,000, on which a bonus of £400 had lately been declared, bequeathed to his wife "the premium of assurance with the R. A. Company." It was held by Wood, V.-C., that the word "premium" must be read as meaning "bonus," and that evidence was not admissible to show that by the word "premium" the testator meant "policy"; if, however, there had been no bonus the case would have been different.

Evidence is also admissible in certain cases to explain words which have a peculiar, technical or local meaning (*e*).

Subject to these qualifications the rule is of general application.

"Copyhold" not extended to freeholds by parol evidence.

Thus, in *Doe* d. *Brown* v. *Brown* (*f*), it was held that a devise of copyhold lands could not be extended to freeholds, by the production of evidence showing that the testator had so described them in a deed executed by him, the will itself furnishing no

(*b*) First edition, p. 358, n. See also the rule as stated by Wood, V.-C., (*in Bernasconi* v. *Atkinson*, 10 Ha., p. 348. As to the case of *Beaumont* v. *Fell*, 2 P. W. 141, cited by Mr. Jarman in support of the suggested exception to the general rule, see *post*, p. 489.

(*c*) *Re Hooper*, 88 L. T. 160. As to the use of nicknames, etc., see *post*, p. 478.

(*d*) 1 Jur. (N.S.) 994.

(*e*) *Post*, p. 489.

(*f*) 11 East, 441. See *Hughes* v. *Turner*, 3 My. & K. 666, where Sir C. Pepys, M.R., held that a revoked will could not be looked at for the purpose of influencing the construction of the subsequent unrevoked instrument. See also *M'Leroth* v. *Bacon*, 5 Ves. 165; *Randall* v. *Daniel*, 24 Bea. 193. These cases must be distinguished from those in which a revoked will can be referred to for the purpose of correcting a mistake in the description of a legatee, etc., *post*, p. 488. But a revoked clause in a will cannot affect the construction of an unambiguous codicil: *Choa Eng Wan* v. *Choa Giang Tee*, [1923] A. C. 469.

distinct indication that the testator meant to give what was conveyed by the deed, and there being copyhold lands to satisfy the devise.

Extent of "estate of Ashton" not enlarged by extrinsic evidence.

So, in *Doe* d. *Chichester* v. *Oxenden* (*g*) (which is a leading authority), where a testator devised his "estate of Ashton, in the county of Devon"; and evidence was adduced to show that the testator was accustomed to distinguish by the appellation of his "Ashton estate" the whole of his maternal estate, including property in several contiguous parishes; the Court of Common Pleas, notwithstanding this evidence, held that only the property in the manor of Ashton passed; Sir James Mansfield observing, that this would give the will an effectual operation, and herein the case differed from all others in which such evidence had been received: for in them, without it, the devise would have had no operation; and it was, he said, safer not to go beyond the line. This decision was affirmed in D. P. on the unanimous opinion of the Judges (*h*); and the principle of it has been since repeatedly recognised. Thus, in *Doe* d. *Browne* v. *Greening* (*i*), the Court of K. B., on its authority, rejected evidence offered to show that, under a devise of lands "*at* Coscomb," it was intended to include lands *near* Coscomb.

Construction of words not varied by evidence of actual intention.

So, in *Doe* d. *Tyrrell* v. *Lyford* (*k*), where the testator devised lands at Sutton Wick, in the Parish of Sutton Courtney, which he purchased of S, the same Court would not allow it to be proved by extrinsic evidence that he intended to include certain pieces of ground not in the hamlet of Sutton Wick, but parcel of the estate purchased of S, and in the parish of Sutton Courtney.

Evidence to show meaning in which testator used name.

But cases of this kind must be distinguished from those cases in which a testator uses a general name to designate a property made up of parts, some of which do not properly answer the description. Such are the cases of *Doe* v. *Jersey* (*l*), and *Ricketts* v. *Turquand* (*m*), discussed in later sections of his chapter (*n*).

Words of will are those of the testator.

The Courts always assume that the language of a will is the language of the testator. Even where, as is generally the case,

(*g*) 3 Taunt. 147. This case seems to have settled a point left in doubt by *Whitbread* v. *May*, 2 B. & P. 593.

(*h*) 4 Dow, 65, s. n. *Doe* d. *Oxenden* v. *Chichester*.

(*i*) 4 M. & Sel. 171. See also *Evans* v. *Angell*, 26 Bea. 202. But as to the meaning of "at," see *Homer* v. *Homer*, 8 Ch. D. 758. See also *McGonigle* v. *McGonigle*, [1910] 1 Ir. 297 ("my house and farm").

(*k*) 4 M. & Sel. 550. See also *Doe* d. *Preedy* v. *Holton*, 5 Nev. & M. 391; *King* v. *King*, 13 L. R. Ir. 531. As to *Collison* v. *Girling*, 4 My. & C. 63; 9 Cl. & Fin. 88 (*Collison* v. *Curling*), see Wigr. Wills (5th ed.), 35-43.

(*l*) 3 B. & Cr. 870.

(*m*) 1 H. L. C. 472.

(*n*) *Post*, pp. 467, 486.

the language of the will is not that of the testator, but is proposed to him by his professional adviser, by executing the will he adopts its language, and the words must therefore be taken to be his (*o*). Parol evidence that a will was or was not drawn by a skilled person is not admissible, though any evidence on the point apparent on the face of the will may be considered in construing it (*p*). But if the will contains technical terms of law, the technical is the primary meaning (*q*).

Words may be diverted from their primary acceptation by inconsistency of context.

II.—Admissible to reconcile Inconsistency in Will.—Mr. Jarman continues (*r*): "If, however, the context of the will presents an obstacle to the construing of the terms of description in their strict and most appropriate sense, a foundation is thereby laid for the admission of evidence showing that they are susceptible of some more popular interpretation, which will reconcile them with, and give full scope and effect to, such seemingly repugnant context.

Devise of the "Briton Ferry Estate."

"To this principle, it is conceived, may be referred the important and much discussed case of *Doe* d. *Beach* v. *Earl of Jersey*" (*s*). In that case a testatrix, after reciting a power reserved to her by her settlement, on her marriage with G. V. P., devised, subject to the estate for life of her husband therein, all that her Briton Ferry estate, with all the manors, advowsons, messuages, buildings, lands, tenements, and hereditaments thereto belonging, or of which the same consisted. In a subsequent part she added: "Also I give my Penlline Castle estate, which, as well as my Briton Ferry estate, is situate, lying, and being in the county of Glamorgan," etc. A claim was laid under this devise to certain lands which were neither in the parish of Briton Ferry nor in the county of Glamorgan, but in a parish in the county of Brecon. It appeared by special verdict that the Glamorganshire lands contained 30,000 acres, part whereof consisted of the messuage and lands in the parish of Briton Ferry, comprising the whole of the parish; and that the Brecon lands contained 4,000 acres: that there were six advowsons, of which the advowson of the parish of Briton Ferry was one, and one manor, and one undivided sixth of another manor in Glamorgan, and that there was no manor of Briton Ferry. Objections were made to the reception of certain evidence,

(*o*) *Per* Wood, V.-C., in *Bernasconi* v. *Atkinson*, 10 Ha., at p. 349. See *Weale* v. *Ollive*, 32 Bea. 423; *Rhodes* v. *Rhodes*, 7 A. C. 199; *Parker* v. *Felgate*, 8 P. D. 171; *Re Dayrell*, [1904] 2 Ch. 496.

(*p*) *Richards* v. *Davies*, 13 C. B. (N.S.) 69, 861.

(*q*) *Thellusson* v. *Rendlesham*, 7 H. L. C. 449, 486; *Leach* v. *Jay*, 9 Ch. D. 42; *Re Fraser*, [1904] 1 Ch. 111.

(*r*) First edition, p. 361.

(*s*) 3 B. & Cr. 870; *post*, p. 486.

consisting of old account-books, in which was the following entry: "Briton Ferry Estate in the county of Brecon"; and of proof that the lands in question, together with the other property, had all gone by the name of the Briton Ferry estate. Abbott, C. J., delivered the opinion of the Judges, namely, that the words "all that my Briton Ferry estate, with all the manors, etc," found in the will of this testatrix, in which mention also was made of "her Penlline Castle estate," denoted a property or estate known to the testatrix by the name of her Briton Ferry estate, and not an estate locally situate in a parish or township of Briton Ferry (*t*), and consequently that a question arising upon any particular tenement was properly a question of parcel or no parcel, and they therefore thought the several matters offered to be proved and given in evidence on the part of the defendant were admissible and ought to have been received. However, on account of an imperfection in the special verdict, the House of Lords awarded a *venire de novo*.

Words "thereunto belonging."

So, in *Doe* d. *Gore* v. *Langton* (*u*), it was contended that the words "thereunto belonging" must be taken in their primary sense, the consequence of which would be to exclude the lands in question by reason of the words being correctly applicable in every particular to other lands. But the Court of K. B. thought that it was to be collected from the face of the will itself, that the testator had not used the disputed words in their primary sense (*x*), and held that extrinsic evidence was therefore admissible to show in what sense he had used them. Lord Tenterden, C.J., in delivering the judgment of the Court said: "The extrinsic facts in this case leave no room to doubt that the testator intended his newly-acquired property to pass by his will as part of his Barrow estate; but, nevertheless, it cannot pass unless that meaning can be collected from the will itself; and there are two clauses in the latter part of the will which appear to manifest that intention, and to be sufficient to authorise us to put such a construction on the words *thereunto belonging* as will accord with, and give effect to, that intention."

Clause improperly introduced into will may be rejected on issue *devisavit vel non*.

III.—Admissible to show Insertion of Words or Execution of Will through Mistake or Fraud.—In cases of mistake the

(*t*) The same case had previously been before the Court of K. B. on a somewhat different point; and there Bayley, J., said it was clear that the devise could not be confined to that part of the estate which was within the parish of Briton Ferry, for the testatrix spoke of manors and advowsons, and in that part of the estate there was no manor and only one advowson; the devise, therefore, must extend to the whole of the Briton Ferry estate: 1 B. & Ald. 558.

(*u*) 2 B. & Ad. 680.

(*x*) 2 B. & Ad. 693.

authorities seem to have established this distinction (*y*), "that though you cannot resort to parol evidence to control the effect of words or expressions which the testator has used, by showing that he used them under mistake or misapprehension, nor to supply words which he has not used, yet that you may, upon an issue *devisavit vel non*, prove that clauses or expressions have been inadvertently introduced into the will, contrary to the testator's intention and instructions, or, in other words, that a part of the executed instrument is not his will. In support of this doctrine may be adduced the case of *Hippesley* v. *Homer* (*z*), where a testator, having, by his will dated in 1800, devised his estate to certain limitations, by a codicil made in 1804, after empowering one of the devisees for life to make a jointure and charge portions for children, made certain variations in the limitations in the will, and gave certain additional powers of management to his trustees. The bill alleged, that the testator executed the codicil upon the representation and in the belief that it contained nothing but powers to the devisee for life to make a jointure and charge portions for children, and prayed that it might be set aside. The facts charged were admitted by the answer. Issues were directed—First, as to whether the testator did, by a paper writing, purporting to be a codicil to his will, devise in manner following: (Then follow the words of the codicil, by which only the powers of jointuring and charging portions were conferred). Secondly, whether the testator did, by the said codicil, devise in manner following: (Here was set forth the remaining part of the codicil). The jury found that the part of the codicil which was the subject of the second issue did not constitute the will of the testator; and that the part of the codicil which was the subject of the first issue did constitute the will of the testator. Whereupon the Court (not being able to direct the instrument to be delivered up, as part of it was good), declared that so much of the codicil as did not constitute the will of the testator was void."

Hippesley v *Homer.*

Under the modern practice, the question whether words have been introduced into a will by mistake is often considered by the Court of Probate, and if it is found that they do not form part of the will, the Court directs them to be omitted from the

Probate practice.

(*y*) So stated by Mr. Jarman, first edition, p. 355. See the distinction suggested by Leach, V.-C., in *Earl of Newburgh* v. *Countess of Newburgh*, *ante*, p. 463.

(*z*) T. & R. 48 n. See also *Powell* v. *Mouchett*, 6 Mad. 216; *Lord Trimlestown* v. *D'Alton*, 1 D. & Cl. 85; *Lord Guillamore* v. *O'Grady*, 2 Jo. & Lat. 210.

probate (*a*). The right words, however, cannot be inserted (*b*), although a clear mistake as to the name or residence of an executor may be corrected in order to avoid difficulties with banks, companies, etc. (*c*). And in *Birks* v. *Birks*, where a testator executed a new will, intending it to be a copy of his old will, with one clause omitted, parol evidence was admitted to show that other parts had been omitted by mistake, and both wills were admitted to probate in order to rectify the mistake (*d*).

When a will has been proved, evidence is not admissible in a Court of Construction to show that certain words contained in the probate copy were inserted in the original will by mistake (*e*).

Execution of wrong instrument;

Parol evidence is admissible in the Court of Probate to show that a document duly executed as a will was never intended to operate as the will of the deceased; as, if two persons, intending to make their wills, each by mistake executes the document prepared for the other (*f*): or to show that a document was

—of a pretended will;

not intended to be testamentary, but only as a contrivance to effect some collateral object, *e.g.*, to be shown to another person to induce him to comply with the pretended testator's wish (*g*). In both these cases the *animus testandi* is wanting. So extrinsic evidence is admissible to prove that an incomplete will was intended to revoke a complete will of earlier date (*h*), or to show what papers constitute the will, and for this purpose declarations made by the testator, whether before or after the

—of a duplicate.

execution of the will, are admissible (*i*). But if probate is granted of two documents which are identical, or nearly identical, parol evidence is not admissible in the Court of Construction to show that the later was intended to be a duplicate of the earlier one, and not a distinct instrument (*k*).

(*a*) *In b. Duane*, 2 Sw. & Tr. 590; *In b. Oswald*, L. R. 3 P. & D. 162; *Fulton* v. *Andrew*, L. R. 7 H. L. 448; *Rhodes* v. *Rhodes*, 7 A. C., at p. 198; *Morrell* v. *Morrell*, 7 P. D. 68; *Farrelly* v. *Corrigan*, [1899] A. C. 563; *Brisco* v. *Baillie Hamilton*, [1902] P. 234. See *Karunaratne* v. *Ferdinandus*, [1902] A. C. 405, where the nature of the evidence required to justify the Court in omitting words from probate was discussed.

(*b*) *In b. Schott*, [1901] P. 190, overruling *In b. Bushell*, 13 P. D. 7, and *In b. Huddleston*, 63 L. T. 255. See also *Sullivan* v. *Sullivan*, Ir. R. 4 Eq. 457; *In b. Walkeley*, 69 L. T. 419; *In b. Durlacher*, 75 L. T. 664. As to omitting words by consent of all parties see *In b. Boehm*, [1891] P. 247; *In b. Schott*, [1901] P. 190.

(*c*) *In b. Honywood*, [1895] P. 341; *In b. Baskett*, 78 L. T. 843; *In b. De Rosaz*, 2 P. D. 66; *In b. Cooper*, [1899] P. 193.

(*d*) 4 Sw. & Tr. 23. (*e*) *Re Bywater*, 18 Ch. D. 17.

(*f*) *In b. Hunt*, L. R. 3 P. & D. 250; *Estate of Meyer*, [1908] P. 353.

(*g*) *Lister* v. *Smith*, 3 Sw. & Tr. 282.

(*h*) *Jenner* v. *Ffinch*, 5 P. D. 106; *Estate of Bryan*, [1907] P. 125; *ante*, p. 163. (*i*) *Gould* v. *Lakes*, 6 P. D. 1.

(*k*) *Wilson* v. *O'Leary*, L. R. 7 Ch. 448. The decision in *Hubbard* v. *Alexander*, 3 Ch. D. 738, is obviously erroneous: the question whether the

Presumptions as to testator's knowledge of contents of his will.

The execution of a will by the testator is *prima facie* proof that he knew and approved its contents (*l*), and if a testator knows that certain words are contained in his will and executes it under a mistaken belief as to their effect, they stand as part of the will (*m*). If a testator reads over his will, or has it read over to him, he is presumed to know its contents unless it can be shown that the will was not read over in a proper way (*n*).

Mistake corrected by Court of Construction.

Cases have occurred in which, after a will has been proved, the Court of Construction has arrived at the conclusion that a word forming part of the description of a person or thing has been inserted by mistake, and that a person or thing to which the description does not apply was intended to be referred to by the testator (*o*).

Rule in cases of fraud.

One will surreptitiously obtruded for another.

Mr. Jarman continues (*p*) : " Parol evidence is also admissible for the purpose of counteracting fraud; for to reject it in such case would be to make a rule, whose main object is to prevent injustice, instrumental in producing it. As in *Doe* d. *Small* v. *Allen* (*q*), where it appeared that the testator, upon being pressed by some persons to execute a second will, inquired if it were the same as the former; and being told that *it was*, executed the will, which turned out to be different. The Court of King's Bench held that evidence of these facts ought to have been received. 'I agree,' said Lord Kenyon, 'that the contents of a will are not to be explained by parol evidence; but, notwithstanding the Statute of Frauds, evidence may be given to show that a will was obtained by fraud; and the effect of the evidence offered in this case was to show that one paper was obtruded on the testator for another which he intended to execute.' " And as a charge of fraud may be supported, so it may be rebutted by evidence of this nature. Thus, in *Doe* v. *Hardy* (*r*), where the defence to a claim under a codicil to the testator's will was, that the codicil was a forgery; an objection was made to the receipt of evidence offered by the plaintiff of declarations by the testator that he intended the

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testator meant the legacies to be cumulative or substitutional must be decided by the wording of the will and codicils, with evidence of the state of facts. See *Robley* v. *Robley*, *Coote* v. *Boyd*, *Whyte* v. *Whyte*, and other cases cited *post*, p. 1093. In *Doe* v. *Strickland*, 8 C. B. 724, the will was a will of realty under the old law.

(*l*) *Beamish* v. *Beamish*, [1894] 1 Ir. R. 7.

(*m*) *Guardhouse* v. *Blackburn*, L. R. 1 P. & D. 109; *Collins* v. *Elstone*, [1893] P. 1.

(*n*) *Fulton* v. *Andrew*, L. R. 7 H. L. 448; *Garnett-Botfield* v. *Garnett-Botfield*, [1901] P. 335.

(*o*) *Post*, p. 488.

(*p*) First edition, p. 356.

(*q*) 8 T. R. 147.

(*r*) 1 Moo. & R. 525.

lessor of the plaintiff should have the property. But Littledale, J., thought the declarations of the testator were admissible to show his intentions where the defence was either fraud, circumvention, or forgery.

If A fraudulently induces a testator to include in his will a legacy or other provision in A's favour, probate will be granted of the rest of the will (*s*).

Whether person obtaining will by fraud is a trustee for persons defrauded.

If a testator is induced by the fraud of A, the residuary legatee, to omit from his will a provision in favour of B, it seems that the Court of Probate may declare A to be a trustee for B (*t*). A Court of Equity has no jurisdiction (*u*).

Promise by heir or devisee to testator enforced.

IV.—Admissible to prove or repel Trusts, Double Portions, etc.—Mr. Jarman continues (*x*): "Another illustration of the principle occurs in the case suggested by Lord Eldon in *Stickland* v. *Aldridge* (*y*), 'of an estate suffered to descend, the owner being informed by the heir, that, if the estate is permitted to descend, he will make a provision for the mother, wife, or any other person, there is no doubt equity would compel the heir to discover whether he did make such promise. So, if a father devises to the youngest son, who promises that, if the estate is devised to him, he will pay £10,000 to the eldest son, equity would compel the former to discover whether that passed in parol; and, if he acknowledged it, even praying the benefit of the statute, he would be a trustee to the value of £10,000.'

"And it is clear that, in such a case (and this, indeed, is the point which is chiefly material here), if the trust were denied by the heir or devise, it might be proved *aliunde*" (*z*).

Trust apparent on will.

In the cases cited by Mr. Jarman, the existence of a trust was not disclosed on the face of the will, but the principle applies also to those cases where the gift appears by its terms to be wholly or partially upon trust (*a*).

Re Fleetwood.

In *Re Fleetwood* (*b*); a testatrix bequeathed to B her personal estate, "to be applied as I have requested him to do."

(*s*) *Farrelly* v. *Corrigan*, [1899] A. C. 563.

(*t*) See *Mitchell* v. *Gard*, 3 Sw. & Tr. 75; *Betts* v. *Doughty*, 5 P. D. 26.

(*u*) *Allen* v. *M'Pherson*, 1 H. L. C. 191; *Meluish* v. *Milton*, 3 Ch. D. 27. An attempt to invoke the jurisdiction was made in *Re Birchall*, 44 L. T. 243, but there the defendant was executor and trustee of the will: the attempt failed in the absence of evidence of fraud.

(*x*) First edition, p. 356.

(*y*) 9 Ves. 519. See also *Drakeford* v. *Wilks*, 3 Atk. 539. The question of undisclosed trusts is also discussed *post*, p. 884.

(*z*) See *Oldham* v. *Litchford*, 2 Vern. 506; *Chester* v. *Urwick*, 23 Bea. 407; *Proby* v. *Landor*, 28 Bea. 504; *McCormick* v. *Grogan*, L. R. 4 H. L. 82; *Norris* v. *Frazer*, L. R. 15 Eq. 318, and other cases cited *post*, p. 887.

(*a*) *Podmore* v. *Gunning*, 7 Sim. 644; *Irvine* v. *Sullivan*, L. R. 8 Eq. 673; and other cases cited *post*, p. 884. In *Re Gardom*, [1914] 1 Ch. 662, the plaintiffs failed to establish the existence of the trust.

(*b*) 15 Ch. D. 594; *Re Blackwell*, [1928] Ch. 614; *Blackwell* v. *Blackwell*, [1929] A. C. 318.

Before the execution of the will the testatrix communicated to B her wishes with regard to the disposition of the property. Hall, V.-C., upon the authority of decisions made before the Wills Act (which requires a will of personalty to be in writing), and of an Irish case, *Riordan* v. *Banon* (*c*), held that evidence of the parol trust thus communicated was admissible, and that the trust was valid against the next-of-kin. The correctness of the decision seems to have been questioned by Farwell, J., in *Re Huxtable* (*d*), but no doubt on this point was felt by the Court of Appeal (*e*). In that case a testatrix bequeathed £4,000 to C, "for the charitable purposes agreed upon between us"; the Court of Appeal held that evidence was admissible to show what the charitable purposes were, but not to show that they were only to continue during the life of C.

Doctrine does not apply to powers.

The doctrine laid down in *Re Fleetwood* does not apply to powers. Accordingly in *Re Hetley* (*f*), where the testator gave his property to his wife for life, and empowered her to dispose of it "in accordance with my wishes verbally expressed by me to her," it was held by Joyce, J., that evidence could not be admitted to show what these wishes were, and that there was consequently an intestacy, subject to the widow's life interest.

It is also clear that the doctrine in question does not allow a testator to create a trust by an unattested paper not incorporated in the will, and not communicated to the devisee or legatee during the testator's lifetime. Thus, where a testator by his will gave all his property to C absolutely, and died without having communicated to C any directions as to its disposal, but after the testator's death an unattested paper was found expressing the testator's wish that C should hold the property as trustee for B; it was held by Sir E. Kay, J., that no valid trust in favour of B was created; and C admitting himself to be only a trustee, he was declared to be trustee for the next-of-kin (*g*).

Whether parol evidence is admissible to repel a resulting trust.

"It seems, too," says Mr. Jarman (*h*), "that parol evidence is admissible for the purpose of rebutting a resulting trust; as in such case, it does not contradict the will, its effect being to support the legal title of the devisee against, not a trust expressed (for that would be to control the written will), but

(*c*) Ir. R. 10 Eq. 469.
(*d*) [1902] 1 Ch. 214.
(*e*) [1902] 2 Ch. 793.
(*f*) [1902] 2 Ch. 866. As to *Tharp* v. *Tharp*, [1916] 1 Ch. 142; [1916] 2 Ch. 205, see *post*, p. 888.
(*g*) *Re Boyes*, 26 Ch. D. 531. See *post*, p. 888.
(*h*) First edition, p. 357.

against a mere equity arising by implication of law" (*i*). But the doctrine in question is anything but clear. In *Gladding* v. *Yapp* (*k*), where it was contended that a direction to keep accounts made the executrix a trustee, Leach, V.-C., stated the rule thus: "Parol evidence is not admissible to contradict a will, and if the will contain express declarations that the executor is to be a trustee, evidence cannot be received against the effect of that declaration; but if there be no express declaration of trust in the will, and only circumstances which afford inference or presumption of trust in the executor, there parol evidence is admissible to answer that inference or presumption." And in *Croome* v. *Croome* (*l*), Stirling, J., held that parol evidence was not admissible to rebut a resulting trust.

Parol evidence admissible to support claim of executor to residue against Crown.

Presumption raised by legacy to sole executor,

On the principle above stated, parol evidence was, under the old law, admissible to support the claim of an executor (taken away by the Executors Act, 1830) to be undisposed-of residue of a testator's personal estate, against the presumption in favour of the next-of-kin created by a legacy to the executor (*m*), and was prior to 1926 (see section 49 (b) of the Administration of Estates Act, 1925) still admissible in cases where a testator left no next-of-kin, so that there was a contest between the executor and the Crown. In such cases, the general rule was that the executor should have "the undisposed-of residue" (that is, all personal estate which is not disposed of, or attempted to be disposed of, by the will (*n*)), unless there was a strong presumption to the contrary. A legacy to him (specific or pecuniary), affords that presumption (*o*), but it is not so strong

(*i*) *Mallabar* v. *Mallabar*, Cas. t. Talb. 79.

(*k*) 5 Madd. 56; *Barrs* v. *Fewkes*, 34 L. J. Ch. 522.

(*l*) 59 L. T. 582; 61 L. T. 814. The Court of Appeal and House of Lords held that there was no resulting trust, and consequently the point as to evidence became immaterial. See *post*, pp. 693, 840.

(*m*) The question is discussed in detail in Roper on Legacies (4th ed.), 1685 *seq.* Only the most important rules are here referred to. As to the effect of an express gift of the residue to an executor, see *post*, p. 697.

(*n*) Consequently he does not take property comprised in a bequest which lapses or is void (*Androvin* v. *Poilblanc*, 3 Atk. 299; *Bennet* v. *Batchelor*, 3 Br. C. C. 28; *Att.-Gen.* v. *Tomkins*, Ambl. 216), or property given to the executor upon a trust which is void or fails (*Powell* v. *Merrett*, 1 Sm. & G. 381; *Dacre* v. *Patrickson*, 1 Dr. & S. 182; *Johnstone* v. *Hamilton*, 11 Jur. (N.S.) 777; *Chester* v. *Chester*, L. R. 12 Eq. 444): or upon trusts which are not declared (*Milnes* v. *Slater*, 8 Ves. 295; *Taylor* v. *Haygarth*, 14 Sim. 8; *Vezey* v. *Jamson*, 1 S. & St. 69; *Cradock* v. *Owen*, 2 Sm. & G. 241; *Read* v. *Stedman*, 26 Bea. 495; *Chester* v. *Chester*, L. R. 12 Eq. 444).

(*o*) *Nourse* v. *Finch*, 1 Ves. jun. 344; *S. C., sub nom. Hornsby* v. *Finch*, 2 Ves. jun. 78; *Southcot* v. *Watson*, 3 Atk. 226; *Seley* v. *Wood*, 10 Ves. 71; *Oldman* v. *Slater*, 3 Sim. 84; and *Lynn* v. *Beaver*, T. & R. 63 (three cases of reversionary legacies); *Zouch* v. *Lambert*, 4 Br. C. C. 326 (life interest to testator's wife); *Dicks* v. *Lambert*, 4 Ves. 725 (same case). As to a contingent reversionary interest, see *Jones* v. *Westcomb*, Prec. Ch. 316; *Lynn* v. *Beaver* T. & R. 63. The executor's claim to the residue is not affected by a devise or bequest to his wife: *Wilson* v. *Ivat*, 2 Ves. sen. 166; *Fruer* v. *Bouquet*, 21 Bea. 33.

as to deprive him of the opportunity of proving, by parol evidence, that the testator intended him to take the residue beneficially (*p*). Where there are two or more executors, a similar presumption is raised by the fact that pecuniary legacies of equal amount are given to all of them, but not where the legacies are unequal; or where there are legacies to some and not to others (*q*); or where, although equal pecuniary legacies are given to all the executors, other interests in the personal estate are given them by the will, which result in their taking unequal beneficial interests (*r*). It seems that the presumption would arise if the executors took equal interests in the personalty, but unequal interests in the real estate (*s*).

—or equal legacies to several executors.

It may appear from the general tenour of the will, or from the terms in which the executor is appointed, that he is "only named for the sake of executing the will, and to have the trouble and not any benefit" (*t*). Again, if the testator "manifests an inchoate intention to appoint a residuary legatee," but fails to do so, this raises a presumption that the executor was not intended to take the residue for his own benefit, which may be rebutted by parol evidence (*u*). But if the testator gives a legacy to the executor (or to one of several executors) "for his care" or "for his trouble," or gives the residue upon a trust which fails, or clearly intends to create a trust although he does not do so, then it appears on the face of the will that the executor was intended to take the office only (*x*), and parol evidence to show that he

Intention to exclude executor shown in other ways.

(*p*) *Clennell* v. *Lewthwaite*, 2 Ves. jun. 465; *Langham* v. *Sanford*, 2 Mer. 6. But if the legacy is given by way of exception out of another bequest, or as a particular interest (*Griffith* v. *Rogers*, Pr. Ch. 231; *Beaufort* v. *Granville*, 3 Bro. P. C. 37; *Newstead* v. *Johnston*, 2 Atk. 45), no presumption arises against the executor's claim. Where the presumption arises, it is not rebutted by the fact that legacies are given to the next-of-kin: *Randall* v. *Bookey*, 2 Vern. 425; *Dicks* v. *Lambert*, 4 Ves. 725; *Farrington* v. *Knightly*, 1 P. W. 544.

(*q*) *Saltmarsh* v. *Barrett*, 3 D. F. & J. 279; *Cradock* v. *Owen*, 2 Sm. & G. 241; *Re Hudson's Trusts*, 52 L. J. Ch. 789; *Bowker* v. *Hunter*, 1 Br. C. C. 328; *Oliver* v. *Frewen*, *ib.* 590; *Williams* v. *Jones*, 10 Ves. 77; *Griffiths* v. *Hamilton*, 12 Ves. 298; *Wilson* v. *Ivat*, 2 Ves. sen. 166; *Rawlings* v. *Jennings*, 13 Ves. 39; *Re Knowles*, 49 L. J. Ch. 625; *Pratt* v. *Sladden*, 14 Ves. 193; *Russell* v. *Clowes*, 2 Coll. 648; *Ommanney* v. *Butcher*, T. & R. 260.

(*r*) *Att.-Gen.* v. *Jefferys*, [1908] A. C. 411, affirming C. A. in *Re Glukman*, [1908] 1 Ch. 552, reversing [1907] 1 Ch. 171.

(*s*) *Muckleston* v. *Brown*, 6 Ves. 64.

(*t*) *Androvin* v. *Poilblanc*, 3 Atk. 299; *Seley* v. *Wood*, 10 Ves. 71; *Braddon* v. *Farrand*, 4 Russ. 87; *De Mazar* v. *Pybus*, 4 Ves. 644; *Giraud* v. *Hanbury*, 3 Mer. 150; *Dillon* v. *Reilly*, 9 L. R. Ir. 57; *Sadler* v. *Turner*, 8 Ves. 617.

(*u*) *Bennet* v. *Batchelor*, [1925] 1 Ch. 340; *Bishop of Cloyne* v. *Young*, 2 Ves. sen. 91; *North* v. *Purdon*, 2 Ves. sen. 495; *Mordaunt* v. *Hussey*, 4 Ves. 117; *Mence* v. *Mence*, 18 Ves. 348; *Re Bacon's Will*, 31 Ch. D. 460; *Re Jones*, [1925] 1 Ch. 340.

(*x*) *Seley* v. *Wood*, 10 Ves. 71; *White* v. *Evans*, 4 Ves. 21; *Milnes* v. *Slater*, 8 Ves. 295; *Ellcock* v. *Mapp*, 3 H. L. C. 492; *Taylor* v. *Haygarth*, 14 Sim. 8; *Read* v. *Stedman*, 26 Bea. 495; *Dawson* v. *Clarke*, 15 Ves. 409; 18 Ves. 247; *Re Roby*, [1908] 1 Ch. 71, *post*, p. 698. In *Dawson* v. *Thorne*, 3 Russ. 235, it was held that the bequest to one of the executors was for services not incident to the office.

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was intended to take the residue beneficially is not admissible (*y*). The executor's claim was also excluded, if the testator declared his intention of disposing of a part only of his personal estate (*z*), or directed that his residue should go as if he were to die intestate (*a*), or if there was a secret trust which failed (*b*). In all these cases the executor was trustee for the next-of-kin, or if there were none, for the Crown (*c*).

Specific trust.

But if the executor was only appointed trustee for a specific purpose, this did not exclude his claim (*d*).

To rebut presumption against double portions and legacies, satisfaction, etc.

Parol evidence may also be adduced to repel the presumption against double portions (*e*); in other words, to show that a legacy by a parent to his child was intended not to be (as the general rule would make it) a satisfaction of a portion previously due to such child by the testator, or that a subsequent advancement to the child was not to be (as it would be, according to the general doctrine) a satisfaction or ademption, entire or partial, according to its amount (*f*), of a legacy to such child (*g*). It is hardly necessary to say that, where a will contains an express direction to bring advances into hotchpot, parol evidence is not admissible to show that the testator afterwards agreed to treat the advances as gifts (*h*). So evidence is admissible to rebut the presumption that a debt is satisfied by a legacy of greater amount (*i*), or that a legacy given for a purpose has been adeemed by a payment for the same purpose (*k*).

Other examples.

It is clear, also, that parol evidence is admissible to prove the fact that the testator intended to place himself in *loco parentis* towards a legatee, who was not his child (*l*); or to prove that gifts have been made to the legatee by the testator in his lifetime, and that they were of a nature to bring them within the equitable

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(*y*) *Lynn* v. *Beaver*, T. & R. 68; *Re Hudson's Trusts*, 52 L. J. Ch. 789; *Rachfield* v. *Careless*, 2 P. W. 158; Roper on Legacies, 1702, 1739. If the intention to create a trust is not clear, parol evidence is admissible: *Gladding* v. *Yapp*, 5 Madd. 56.

(*z*) *Urquhart* v. *King*, 7 Ves. 225.

(*a*) *Cranley* v. *Hale*, 14 Ves. 307.

(*b*) *Johnstone* v. *Hamilton*, 11 Jur. (N.S.) 777.

(*c*) *Taylor* v. *Haygarth*, 14 Sim. 8; *Johnstone* v. *Hamilton*, *supra*; *Read* v. *Stedman*, *supra*; *Chester* v. *Chester*, L. R. 12 Eq. 444.

(*d*) *Batteley* v. *Windle*, 2 Br. C. C. 31; *Griffiths* v. *Hamilton*, 12 Ves. 298; *Pratt* v. *Sladden*, 14 Ves. 193.

(*e*) The old cases will be found in Roper on Legacies, 391 *seq.*; among modern cases may be mentioned *Re Tussaud's Estate*, 9 Ch. D. 363; *Montagu* v. *Earl of Sandwich*, 32 Ch. D. 525; *Re Lacon*, [1891] 2 Ch. 482; *Re Ashton*, [1898] 1 Ch. 142; *Re Scott*, [1903] 1 Ch. 1. See *post*, p. 1132.

(*f*) *Pym* v. *Lockyer*, 5 My. & C. 29.

(*g*) Roper on Legacies, 367 *seq.*

(*h*) *Smith* v. *Conder*, 9 Ch. D. 170.

(*i*) *Wallace* v. *Pomfret*, 11 Ves. 542.

(*k*) *Re Pollock*, 28 Ch. D. 552. See the rule stated *post*, p. 1129.

(*l*) *Powys* v. *Manfield*, 3 My. & C. 359.

presumption (*m*), or within the terms of an express declaration contained in the will (*n*), that advancements should be in satisfaction of legacies. And for this purpose contemporaneous declarations of the testator's intentions are admissible; since the rule which would exclude them, if the intention had been committed to writing, does not apply.

Counter-evidence.

In all these cases, where parol evidence is admissible to repel the presumption, counter-evidence is also admissible in support of it; the evidence on either side being admissible, not for the purpose of proving, in the first instance, with what intent the writing was made, but simply with the view of ascertaining whether the presumption, which the law has raised, is well- or ill-founded (*o*). But evidence in support of the presumption is not admissible, unless evidence to rebut it has been first admitted; still less is evidence admissible to create a presumption not raised by the law; in the former case it is unnecessary (*p*), and in both cases its effect would be to contradict the apparent meaning of the will (*q*).

As to translating or deciphering peculiar characters,

—and explaining local or technical terms.

V.—Admissible to explain Technical Terms, Foreign Words, Nicknames, etc.—If a testator make his will in a foreign language, or introduce therein certain terms or characters which are not understood by the Court, recourse may be had to persons conversant with the subject, for the purpose of translating the will (*r*), or deciphering the characters (*s*). And where the testator makes use of words which in their ordinary sense are intelligible, but which are used by a certain class of persons to which the testator belonged (*t*), or in a certain locality where he dwelt (*u*), in a peculiar sense, parol evidence may be given to

(*m*) *Rosewell* v. *Bennet*, 3 Atk. 77; *Kirk* v. *Eddowes*, 3 Hare, 509; *Twining* v. *Powell*, 2 Coll. 262.

(*n*) *Whateley* v. *Spooner*, 3 K. & J. 542; *M'Clure* v. *Evans*, 29 Bea. 422.

(*o*) *Kirk* v. *Eddowes*, 3 Hare, 517. On this case see *Re Shields*, [1912] 1 Ch. 591.

(*p*) *Kirk* v. *Eddowes*, 3 Hare, 520; *White* v. *Williams*, 3 V. & B. 72.

(*q*) *Hall* v. *Hill*, 1 D. & War. 94; *Lee* v. *Pain*, 4 Hare, 216; *Palmer* v. *Newell*, 20 Bea. 39.

(*r*) *Re Manners*, [1923] 1 Ch. 220.

Meaning of contraction used by testator.

(*s*) *Masters* v. *Masters*, 1 P. W. 421; *Norman* v. *Morrell*, 4 Ves. 769; *Kell* v. *Charmer*, 23 Bea. 195; *Clayton* v. *Lord Nugent*, 13 M. & W. 206, *per* Alderson, B.; *Goblet* v. *Beechey*, 3 Sim. 24, 2 R. & My. 624, Wig. Wills, App. In the last case the question was, whether the word "mod." occurring in the codicil to the will of a sculptor, applied to his models. The opinions of sculptors and persons skilled in handwriting differed on this point; and the ultimate conclusion of Lord Brougham was, that the formal bequest in the will could not be revoked by an imperfectly-expressed and doubtful word introduced into the codicil. An attempt was made to explain the testator's meaning by the evidence of a person who attested his will; but this, of course, was inadmissible.

(*t*) *Clayton* v. *Gregson*, 5 Ad. & Ell. 302; *Shore* v. *Wilson*, 9 Cl. & Fin. 525.

(*u*) *Per* Parke, B., *Richardson* v. *Watson*, as reported 1 Nev. & M. 575; *Smith* v. *Wilson*, 3 B. & Ad. 728; *Anstee* v. *Nelms*, 1 H. & N. 225. In the

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show the fact of such usage, unless it also appears on the face of the will that the testator used the word in the ordinary sense. Generally speaking, for instance, evidence would be admissible to show that the word "close" meant the same thing as "farm" in the country where the property was situate; but if the testator has in another part of the will used the word "closes" (in the plural), it is manifest that he has used the word "close" in its ordinary sense as denoting an "inclosure"; and then such evidence is not admissible; for that would be to contradict the words of the will (*x*).

Re Rayner.

In *Re Rayner* (*y*), it was held that a testator, in using the word "securities" meant investments, and evidence was admitted to show that the word was commonly used in this sense by stockbrokers and men of business, but the decision seems to have turned on the language of the testator.

In *Re Glassington* (*z*), a testatrix devised all her "real estate"; she never had any real estate to which she was beneficially entitled, but there was vested in her as trustees of her father's will certain real estate upon trust for sale, and she was beneficially entitled to a moiety of the proceeds of sale; it was held that this moiety passed by the devise (*a*). Evidence was tendered to the effect that she had before the execution of her will stated that she was entitled to real estate; this evidence was not used, but Joyce, J., inclined to think that it was admissible.

Nicknames.

Again, the testator may have habitually called certain persons by peculiar or nicknames, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence, to show the sense in which he used them, just as if his will were written in cypher or in a foreign language (*b*). Thus, in *Lee* v. *Pain* (*c*), a testatrix, by a codicil dated in 1836, bequeathed "to Mrs. and Miss Bowden, of H., widow and daughter of the late Rev. Mr. Bowden, £200 each." The legacies were claimed by Mrs. and

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last case, the devise was of "lands in the parish of D.," and evidence was admitted to show that a part of the testator's lands which was in another parish was generally reputed to be in the parish of D. But where a word has received a legal signification by statutory definition evidence is not admissible to show that a testator has used that word in a different sense: thus it has been held that extrinsic evidence was not admissible to show that a testator who devised forty-five acres of land in Ireland meant Irish, not statute, acres: *O'Donnell* v. *O'Donnell*, 13 L. R. Ir. 226.

(*x*) *Richardson* v. *Watson*, 1 Nev. & Man. 575, cited *post*, p. 494, on another point. As to the actual decision in this case, see *ante*, p. 436.

(*y*) [1904] 1 Ch. 176.

(*z*) [1906] 2 Ch. 305; *Re Vear*, 62 Sol. J. 159 ("my current account" held to mean deposit account).

(*a*) In accordance with the doctrine stated *post*, pp. 1221, 1240, where this case is referred to.

(*b*) *Per* Lord Abinger, C.B., *Doe* v. *Hiscocks*, 5 M. & Wels. 368.

(*c*) 4 Hare, 251.

Miss Washbourne, the widow and daughter of Mr. D. Washbourne, who had been a dissenting minister at H. The evidence proved that Mrs. Washbourne was the daughter of Mr. Bowden, who died leaving a widow, which latter died in 1820; that the testatrix had been intimately acquainted with Mr. Bowden, and with the claimants, whom she had been in the habit of calling by the name of Bowden, and, on the mistake being pointed out, had acknowledged it. Sir J. Wigram, V.-C., held that the evidence was admissible, and, there being no other Mrs. and Miss Bowden, decreed the legacies to the claimants (*d*).

If there is no person strictly answering the description used by the testator, evidence is admissible to show that there is a person commonly know by the name used by the testator, although it is not his real name (*e*).

Gifts to relations inaccurately described.

It frequently happens that a testator gives property to persons by some generic description—such as "children," "nephews," etc.—which has a well-defined meaning, but the extrinsic circumstances show that the testator used the description in an inaccurate sense. These cases are referred to in the next section.

State of facts at the date of will proper to be regarded.

VI.—When the State of Facts at the Date of the Will may be regarded.—"Though it is (as we have seen) the will itself (and not the intention, as elsewhere collected) which constitutes the real and only subject to be *expounded*, yet, in performing this office, a Court of construction is not bound to shut its eyes to the state of facts under which the will was made; on the contrary, an investigation of such facts often materially aids in elucidating the scheme of disposition which occupied the mind of the testator. To this end, it is obviously essential that the judicial expositor should place himself as fully as possible in the situation of the person whose language he has to interpret (*f*); and guided by the light thus thrown on the testamentary scheme, he may find himself justified in departing from a strict construction of the testator's language, without (to borrow the words of an elegant writer) allowing 'conjectural interpretation to usurp the place of judicial exposition' (*g*). Thus, if it appears (and of course it

(*d*) See also Wigr. Wills. pl. 65, and n.

(*e*) *Dowset* v. *Sweet*, Amb. 175; *Re Hooper*, 88 L. T. 160, and other cases cited *post*, p. 1226. And see the remarks on the case of *Beaumont* v. *Fell*, *post*, p. 490.

(*f*) "You may place yourself, so to speak, in [the testator's] armchair, and consider the circumstances by which he was surrounded when he made his will to assist you at arriving at his intention": *per* James, L.J., in *Boyes* v. *Cook*, 14 Ch. D. p. 56. See also *per* Lord Cairns in *Charter* v. *Charter*, L. R. 7 H. L. 377.

(*g*) "*Vide* Wigram on Ambiguities in Wills, and the Admissibility of Parol Evidence (2nd ed.), 75; a work which should be perused by every person

can only appear by extrinsic evidence) that there is no subject or object answering to the description in the will, strictly and literally construed, but that there is a subject or object precisely answering to such description, interpreted according to the popular and less appropriate sense of the words, the conclusion that the testator employed them in the latter sense is irresistible. Examples of this principle of construction are widely scattered through the present treatise" (*h*). It may be discerned in those cases in which a disposition of property operates as an appointment under a special power, where it would otherwise be nugatory for want of property on which to operate (*i*). It is also exemplified in those cases in which a devise of lands at a given place has been extended to property not strictly answering to the description, because there is none which does precisely correspond to it (*k*), or in which an apparently specific bequest of stock in the public funds has been held to authorise payment of the legacy out of the general personal estate, the testator having no such stock when he penned the bequest (*l*). Again, we discover traces of the doctrine in the rule (hereafter discussed) which construes a gift to the children of a deceased person, or the children "now born" of a living person, as comprising

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who wishes to acquire an intimate acquaintance with this intricate subject." (Note by Mr. Jarman.) The fifth edition contains the text of the third edition, the last published by Wigram, V.-C.

(*h*) The rule as thus stated by Mr. Jarman (first edition, p. 363), is clearly established. See *Doe* d. *Templeman* v. *Martin*, 4 B. & Ad. 771, *per* Parke, J.; *Smith* v. *Doe* d. *Lord Jersey*, 2 Br. & B. 553, cit. 5 B. & Ald. 387, *per* Bayley, J.; *Doe* d. *Freeland* v. *Burt*, 1 T. R. 701; *Guy* v. *Sharp*, 1 My. & K. 602, *per* Lord Brougham; *Att.-Gen.* v. *Drummond*, 1 Dr. & War. 367, *per* Sugden, C.; *Shore* v. *Wilson*, 9 Cl. & Fin. 555, *per* Parke, B.; *Doe* d. *Thomas* v. *Beynon*, 12 Ad. & Ell. 431; *Blundell* v. *Gladstone*, 3 Mac. & G. 692; *Phillips* v. *Barker*, 1 Sm. & Gif. 583; Wigr. Wills, Prop. V. But in *Pilcher* v. *Hole*, 7 Sim. 210, the V.-C. said he could not look at the price of stocks for the purpose of putting a construction on a will. How far it may be assumed that a testator, when he makes his will, has the material circumstances in his mind, see *Hopwood* v. *Hopwood*, 22 Bea. 494, 495; *Re Herbert's Trusts*, 1 J. & H. 121. If he shows by the will that he has taken a mistaken view of the circumstances, that view must govern the construction; see *Hannam* v. *Sims*, 2 De G. &. J. 151. As to the cases in which a legatee is allowed to adduce evidence to contradict an erroneous statement in a will, see under "Estoppel," *post*, p. 533.

(*i*) See *post*, pp. 805 *seq.*

(*k*) *Doe* v. *Roberts*, 5 B. & Ald. 407; see *Baddeley* v. *Gingell*, 1 Exch. 319; but learn the limits of this doctrine from *Miller* v. *Travers*, 1 M. & Scott, 342.

(*l*) *Selwood* v. *Mildmay*, 3 Ves. 306; see, on this much-discussed case, *Miller* v. *Travers*, *ubi supra* (where Tindal, C.J., refers it to the head "*falsa demonstratio non nocet*"). In *Lindgren* v. *Lindgren*, 9 Bea. 358, Lord Langdale, M.R., followed it, and said of it, "The absence of the fund purported to be given showing that a specific legacy was not intended, other evidence was admitted to show how the mistake arose; and this being clearly shown, it was held that the legatees were entitled to payment out of the general personal estate." See also Wigram, Wills (5th ed.), pp. 102, 177, *seq.*; *Auther* v. *Auther*, 13 Sim. 422, where the V.-C. took the context for his sole guide. If in another part of the will the testator correctly described the subject, the inference that he meant to include it in the incorrect description would be rebutted, *Waters* v. *Wood*, 5 De G. & S. 717.

illegitimate children, there being no legitimate child to supply the gift with a more appropriate object; or a gift to the testator's nephews, as a gift to his wife's nephews, he having none, and there being, at the date of his will, no possibility of his ever having any (*m*); or a gift "to the children of A and B" (living persons), as meaning "to B and the children of A" in equal moieties, it appearing that for some years before the date of the will A had not lived with his wife and family (*n*); and lastly, in the rule which reads a devise or bequest as applying to a person or thing imperfectly answering the name and description in the will, there being no person or thing more precisely answering to them. The application of this last rule is discussed elsewhere in connection with the question of misnomer and misdescription (*o*), and in connection with the question what passes by a bequest of "real estate," "stock," "shares," "debentures," etc. (*p*). Extrinsic evidence is rarely admissible to explain the operation of a residuary bequest, but it was admitted in *Re Cadogan* (*q*), in order to assist the Court in determining whether a bequest of the testatrix's "money" passed the whole of her personal estate. *Re Cadogan* was doubted in *Re Buller* (*r*). In *Re Skillen* (*s*) evidence of the testatrix's estate was admitted, but it was held on the construction that "money" comprised the residuary personal estate. In these instances, and many more which might be adduced, the application of the rules of construction evidently depends on and is governed by the state of extrinsic facts (*t*).

State of facts at date of will, when not to influence construction.

"It would be dangerous, however," as Mr. Jarman points out (*u*), "to place this statement of the doctrine in the hands of the reader, unaccompanied by a caution against the mistaken application of it to gifts comprising a subject or object, or a class

(*m*) *Sherratt* v. *Mountford*, L. R. 8 Ch. 928. In *Re Brown*, 26 T. L. R. 257, evidence was admitted as to the testator's usage of the word "wife"; and see *ante*, p. 376.

(*n*) *Re Walbran*, [1906] 1 Ch. 64.

(*o*) See *post*, pp. 1232 *seq.*, and also in the case of charities, *ante*, p. 217.

(*p*) See *post*, pp. 1254 *seq.*

(*q*) 25 Ch. D. 154. See *Higgins* v. *Dawson* (*post*, p. 483), where the will was construed without recourse to extrinsic evidence; and compare *Re Glassington*, [1906] 2 Ch. 305, where the admissibility of evidence in the case of a gift of "real estate" was discussed: *ante*, p. 478.

(*r*) 74 L. T. 406.

(*s*) [1916] 1 Ch. 518.

(*t*) "Observe that, in all the above cases, the parol evidence is not adduced to show that the testator actually intended the devise to have the operation which is given to it, but merely to supply facts from which the Court infers such to be the intention; and this inference would not be allowed to be controlled by the production of evidence showing that the construction thus put on the will is at variance with the testator's real intention." (Note by Mr. Jarman (1st ed.), p. 365.) See *Stringer* v. *Gardiner*, 27 Bea. 35, 4 De G. & J. 468; *Sherratt* v. *Mountford*, L. R. 8 Ch. 928, and the cases cited in the next section.

(*u*) First edition, p. 365.

of objects, which, by the rules of construction, is to be ascertained at the death of the testator, or at any other period posterior to the date of the will. In such cases, it would be manifestly improper to admit the state of facts existing when the will is made to have any influence upon the construction; for instance, since a residuary bequest comprehends all the personal property of which the testator is possessed at the time of his decease, the absence of any given species of property, or of any property whatever, at the date of the will, to satisfy such bequest, ought not, in the slightest degree, to affect its construction by extending the bequest to property not strictly belonging to the testator, or over which he has not any power of disposition. On the same principle, if a testator bequeaths all the stock of a particular denomination, of which he may be possessed at the time of his decease, no argument is supplied for extending the bequest to stock of any other denomination by the circumstance that the testator had at the making of the will no stock answering to the description (*x*). Again, as a devise or bequest to the children of a living person as a class will comprise all who come *in esse* before the death of the testator, the fact of there being no child properly so called, *i.e.*, no legitimate child, at the date of the will, raises no necessary inference that the testator had in his contemplation then existing illegitimate children" (*y*). And in every case it must be remembered that, whatever the surrounding circumstances, it is still the will that is to be construed. In the words of an eminent Judge (*z*), "when the Court has possession of all the facts which it is entitled to know, they will only enable the Court to put a construction on the instrument consistent with the words; and the Judge is not at liberty, because he has acquired a knowledge of those facts, to put a construction on the words which they do not properly bear."

Where will is unambiguous.

The reader will have gathered from the foregoing discussion of the general principle, that if the words of the will are definite and free from doubt, parol evidence is not admissible to show that they meant something different (*a*). Thus in *Maybank* v.

(*x*) The foregoing statement of the general principle must, of course, be read subject to the qualification that if there is any ambiguity in the description of the property, parol evidence as to the state of the testator's property is admissible, *vide ante*, pp. 479 *seq.*

(*y*) *Post*, p. 1739, and see *Doe* d. *Allen* v. *Allen*, 12 Ad. & E. 451.

(*z*) *Per* Sugden, C., *Att.-Gen.* v. *Drummond*, 1 D. & War. 367. And see *per* Cotton, L.J., *Everett* v. *Everett*, 7 Ch. D. 433, 434.

(*a*) Compare the rule that where there is a person answering the description of a legatee, etc., in the will, parol evidence is not admissible to show that the testator meant some one else who does not answer to the description: *post*, p. 504.

Brooks (*b*), a testator bequeathed a legacy to A, " his executors, administrators and assigns " : A was dead at the date of the will, which, however, took no notice of the fact; but the personal representative of A claimed the legacy, insisting that the terms of the bequest made it transmissible, and in support of his claim proposed to read (amongst other) evidence of the testator's knowledge that A was dead; but Lord Thurlow rejected it, saying : " The only fact to which evidence is afforded is, that the death of A was within the knowledge of the testator. The end to which it is to be read is, that the legacy was meant to be transmissible : that could not be from a legatee who had been dead several years. . . . I must accordingly decree the legacy to be lapsed." Again, where a testator, after directing payment of his debts and funeral and testamentary expenses, bequeathed a number of pecuniary legacies, and then gave " all the residue and remainder " of two specified mortgage debts then due to him, after payment of his funeral and testamentary expenses, to three persons named, it was held that parol evidence could not be admitted to show the state of the testator's property in order to found on it the inference that the testator meant his legacies, as well as his debts, etc., to be paid out of the mortgage debts (*c*). The earlier authorities (elsewhere referred to) of *Fonnereau* v. *Poyntz*, *Colpoys* v. *Colpoys*, *Att.-Gen.* v. *Grote*, *Barksdale* v. *Gilliat*, and *Druce* v. *Denison*, in each of which evidence of the condition of the testator's property was admitted, were examined by Rigby, L.J., and shown to be either cases in which property had been bequeathed by an unintelligible description (*d*), or cases in which the testator had, by a testamentary document, referred to the state of his property as explaining the dispositions of his will. Unless some such question arises, it is clear that evidence as to the amount or state of the testator's property is inadmissible to influence the construction of the will, whether the gift is specific (*e*) or residuary (*f*), and whether the property alleged to be disposed

Higgins v. *Dawson.*

(*b*) 1 Br. C. C. 84.

(*c*) *Higgins* v. *Dawson*, [1902] A. C. 1, reversing the decision of Lord Alverstone and Collins, L.J. (Rigby, L.J., dissenting), in *Re Grainger*, [1900] 2 Ch. 756.

(*d*) Where a gift is *prima facie* specific, evidence of the state of the property at the date of the will is admissible : *Sayer* v. *Sayer*; *Innes* v. *Sayer*, 7 Ha. 377; 3 Mac. & G. 606. See *Horwood* v. *Griffith*, 4 M. & G. 708.

(*e*) *Horwood* v. *Griffith*, 4 D. M. & G. 708. The decision of Lord Brougham in *Boys* v. *Williams*, 3 Sim. 563; 2 R. & M. 689, seems to be erroneous.

(*f*) *Stephenson* v. *Heathcote*, 1 Ed. 38; *Cave* v. *Cave*, 2 Ed. 144; *Sibley* v. *Perry*, 7 Ves. 532; *Lord Inchiquin* v. *French*, Amb. 40; *Abbott* v. *Middleton*, 7 H. L. C. 68; Wigr. Wills, p. 88 (5th ed.); *Doe* v. *Gillard*, 5 B. & Ald. 788, is *contra* : *sed qu.* But it is otherwise if it appears by the will that the testator is estimating the amount of his property and its sufficiency for the payments he directs; *Barksdale* v. *Gilliat*, 1 Sw. 566; *Colpoys* v. *Colpoys*,

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of or affected is the testator's own property, or property over which he has a power of appointment (*g*).

Evidence inadmissible to prove recital, etc., to be erroneous.

For the same reason, extrinsic evidence is not admissible to show that a plain and unambiguous direction in a will is founded on a mistake on the part of the testator. Thus, where a testator, after reciting that he had advanced to A £4,000, directed that £4,000 should be brought into account and deducted from his share of the residue, it was held that A was bound by the recital, although the amount advanced to him was less than £4,000 (*h*). In *Re Taylor's Estate* (*i*), the direction to bring advances into account was so worded as, if literally followed, to lead to a palpable absurdity; the Court therefore held that evidence was admissible to show that the statements of fact contained in the will were inaccurate. This decision, therefore, turned on the special words of the will, and does not affect the general principle laid down in *Re Aird's Estate* (*k*).

Inadmissible to define what is indefinite.

It also follows that if the language of the testator is vague and indefinite, parol evidence is not admissible to show that he had something definite in his mind. Thus, if he gives property to be held on trusts contained and specified in any memorandum amongst his papers, parol evidence is inadmissible to show that he had in his mind an existing document (*l*).

Power of appointment.

In *Re Mackenzie* (*m*) evidence was admitted of the state of the testatrix's property, where the question was whether she had intended to exercise a power of appointment.

Parol evidence admissible to show what is comprised within a given description.

VII.—Admissible to Identify Subject or Object of Gift.—Mr. Jarman observes (*n*): "Of course, parol evidence is admissible (and that, without intrenching on the doctrine of *Doe* v. *Oxenden*) (*o*), in order to ascertain what is comprehended in the terms of a given description, referring to an extrinsic fact.

"Thus, if a testator devise the house he lives in (*p*), or his farm called Blackacre (*q*), or the lands which he purchased of A, parol evidence must be adduced to show what house was occupied

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Jac. 451, 457; and see *Singleton* v. *Tomlinson*, 3 A. C. 418, 425. And as to real estate see *Stanley* v. *Stanley*, 2 J. & H. 503: with which compare *Davenport* v. *Coltman*, 12 Sim. 605; *Tennent* v. *Tennent*, 1 J. & Lat. 384.

(*g*) See *Re Huddleston*, [1894] 3 Ch. 595.

(*h*) *Re Aird's Estate*, 12 Ch. D. 291.

(*i*) 22 Ch. D. 495.

(*k*) *Re Wood*, 32 Ch. D. 517.

(*l*) *University College of North Wales* v. *Taylor*, [1908] P. 140; *Re White*, [1925] Ch. 179 (evidence to identify a "former will").

(*m*) [1917] 2 Ch. 58.

(*n*) First edition, p. 367.

(*o*) *Ante*, p. 466.

(*p*) *Doe* d. *Clements* v. *Collins*, 2 T. R. 498.

(*q*) *Goodtitle* v. *Southern*, 1 M. & Sel. 299; see also *Buck* d. *Whalley* v. *Nurton*, 1 B. & P. 53.

by the testator, what farm is called Blackacre, or what lands were purchased of A; such evidence being essential for the purpose of ascertaining the actual subject of disposition. The distinction obviously is, that although evidence *dehors* the will is not admissible, to show that the testator used his terms of description in any peculiar or extraordinary sense, yet it may be adduced to ascertain what the description properly comprehends.

Reference to an extrinsic document.

"Of this principle we have a useful example in *Sanford* v. *Raikes* (*r*), decided by Sir W. Grant, a Judge whose exposition of the principles of law was ever marked by a perspicuity and felicity of illustration peculiarly his own. A testator by codicil devised in these words, 'I give the house in Seymour Place, which I have given a memorandum of agreement to purchase (and which is to be paid for out of timber, which I have ordered to be cut down), to the Rev. John Sanford.' It happened that the testator had shortly before entered into an agreement to purchase the house in question for £7,350, and had, two days after that contract, given an order in writing to his steward, to cut down timber on a particular estate, to the amount of £10,000. One of the objections made by the heir to this devise was, that the codicil did not refer to any particular timber, and could not be made good by evidence *aliunde*; and reliance was placed upon the cases deciding that a will to incorporate another instrument must so describe it, that the Court could be under no mistake. But the M.R. conclusively answered this reasoning. 'I had always understood,' he observed, 'that where the subject of a devise was described by reference to some extrinsic fact, it was not merely competent, but necessary, to admit extrinsic evidence to ascertain the fact; and through that medium, to ascertain the subject of the devise. I do not know what this has to do with cases where there is a reference to some paper which is to make part of the will. There it may be considered that the will itself must specify the paper that is to be incorporated into it. Here, the question is not upon the devise, but upon the subject of it. Nothing is offered in explanation of the will, or in addition to it. The evidence is only to ascertain what is included in the description which the testator has given of the thing devised. Where there is a devise of the estate purchased of A, or of the farm in the occupation of B, nobody can tell what is given, until it is shown by extrinsic evidence, what estate it was that was purchased of A, or what was in the occupation of B. In this case, the direction with regard to payment for the house, amounted in effect to a devise of so much of the produce of the

(*r*) 1 Mer. 646.

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timber ordered to be cut down, as should be sufficient to pay for the house. What is there in the fact here referred to, namely, an antecedent order for cutting down timber, that makes it less a subject of extrinsic evidence, than such a one as I have alluded to? The moment it is shown that it was a given number of trees growing in such a place, or £10,000 worth in value of the timber on such an estate, that the testator had ordered to be cut down, the subject of the devise is rendered as certain, as if the number, value, or situation of the trees, had been specified in the will.'

Ongley v. *Chambers.*

"So, in *Ongley* v. *Chambers* (*s*), where a testator devised the rectory or parsonage of M., with the messuages, lands, tenements, tithes, hereditaments, and all and singular other the premises thereunto belonging, with their and every of their rights, members and appurtenances; it was held, that lands, and a messuage (in addition to the parsonage house) in the same parish, which had been acquired by the owners of the rectory about two centuries ago, and had been uniformly demised and occupied with it since that period, and had been so purchased by and conveyed to the devisor, passed: Lord Gifford, C.J., observed, that the expression was 'messuages'; whereas, strictly speaking, there was but one messuage belonging to the rectory, namely, the parsonage-house. The having recourse to the leases and other extrinsic evidence, to show what lands had been usually enjoyed with the rectory, was objected to on the authority of *Doe* v. *Brown* and the class of cases before stated; but the distinction between the cases is obvious. Here it was a question of parcel or no parcel, the description referred to the fact, and it was governed by the same principle as the case suggested by Sir W. Grant of a devise of lands in the occupation of A."

Devise of "my estate called A."

In *Ricketts* v. *Turquand* (*t*), a testator who had purchased a house and lands, which, together, were generally called and known as the "Ashford Hall estate," devised as follows:—"As it is my wish and desire that all my estate in Shropshire, called Ashford Hall, should be sold, I do, therefore, give and devise the same unto" A and B "in trust to sell," etc. Parol evidence was admitted to show in what sense the testator was in the habit of using the term "my estate called Ashford Hall."

After-acquired property.

Difficulty is sometimes caused by the fact that the testator

(*s*) 8 J. B. Moo. 665.

(*t*) 1 H. L. C. 472; see also *Doe* d. *Gore* v. *Langton*, 2 B. & Ad. 680; *Doe* v. *Jersey*, 1 B. & Ald. 550, 3 B. & Cr. 870; *Goodtitle* v. *Southern*, 1 M. & Sel. 299; *Purchase* v. *Shallis*, 2 H. & Tw. 354; *Webb* v. *Byng*, 1 K. & J. 580, stated *post*; *Gauntlett* v. *Carter*, 17 Bea. 586; *Ross* v. *Veal*, 1 Jur. (N.S.) 751; *Harrison* v. *Hyde*, 4 H. & N. 805.

has, subsequently to the date of his will, added to property devised by it. In such cases, the question arises whether evidence is admissible to show that the testator treated the after-acquired portions as part of the property. It seems clear that if the description of the property is sufficiently wide, the after-acquired part will pass by the devise by virtue of section 24 of the Wills Act; as where the testator devises "all my land at Stour Wood" (*u*) or "my dwelling-house in B., with the appurtenances thereto belonging" (*x*). But if the description is ambiguous, the case is more difficult. In *Webb* v. *Byng* (*y*), the testatrix devised "all my Q. H. Estates in Essex"; this term was not a recognised description of any particular property. Wood, V.-C., admitted evidence to show what estates the testatrix understood to be comprised in that description; but there does not appear to have been any evidence to show that the testatrix treated the after-acquired property as part of the Q. H. Estates, and he held that it did not pass by the devise. In *Castle* v. *Fox* (*z*), the testator devised his "mansion and estate called Cleeve Court, with the appurtenances"; Malins, V.-C., admitted evidence showing what property the testator designated by the description up to the time of his death, and held on that evidence that parts of the estate acquired after the date of the will passed by the devise.

Webb v. *Byng.*

Mr. Jarman continues (*a*): "Upon the same principle, of course, it is not essential to the validity of the gift, either of real or personal estate, that the person who is the intended object of the testator's bounty should be actually pointed out on the face of the will; it is enough that the testator has provided the means of ascertaining it, according to the maxim, *id certum est quod certum reddi potest.* Nor is it material that the description makes the objects of gift to depend upon circumstances or acts of persons which are future and contingent, or even upon the future acts of the testator himself, though this is sometimes resisted as contravening the principle of the statutory requisition of attesting witnesses. There seems, however, to be no valid ground for the objection. Every description

Sufficient that testator provide means of ascertaining the object of gift.

(*u*) *Per* Cotton, L.J., in *Re Portal and Lamb*, 30 Ch. D., at pp. 52—53; *per* Lindley, L.J., *ib.*, at p. 56.

(*x*) *Re Midland Ry. Co.*, 34 Bea. 525. The question discussed in this case was as to the effect of the words "wherein D. C. now resides": see *ante*, pp. 391, 392, and *post*, pp. 1234 *seq.*

(*y*) 2 K. & J. 669.

(*z*) L. R. 11 Eq. 542; *Jennings* v. *Jennings*, 1 L. R. Ir. 552, is to the same effect; *Ricketts* v. *Turquand*, 1 H. L. C. 472, is cited in the judgment, but in that case the point did not arise; *ante*, p. 486. See also *Re Potter*, 83 L. T. 405, stated *ante*, p. 390.

(*a*) First edition, p. 369.

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must more or less involve inquiry into extrinsic facts; and there is no reason why the ascertainment of the objects may not depend as well upon the facts or conduct, past or future, of the testator, as upon any other contingent circumstance (*b*). Hence it was recently decided (*c*), that a devise in favour of the persons who might be partners of the testatrix, or to whom she might sell her business, was valid; Lord Langdale observing, that if the description be such as to distinguish the devisee from every other person, it is sufficient, without entering into the consideration of the question, whether the description was acquired by the devisee after the date of the will, or by the testator's own act in the course of his affairs, or in the ordinary management of his property."

Latent ambiguity.

Even where the intended object of the testator's bounty is described by name on the face of the will, uncertainty may be caused by extrinsic circumstances, as where the gift is to "John Smith," and it appears that there are two John Smiths known to the testator. In such a case evidence is admissible to show which John Smith was meant by the testator (*d*).

Misnomer and misdescription.

Prior will referred to.

Re Feltham's Trusts.

The rule admitting evidence of the nature now under consideration is frequently applied in those cases in which the subject or object of gift is erroneously described in the will. They are referred to in detail in another chapter (*e*), and it is unnecessary to repeat them here. But as an illustration of the nature of the evidence admissible in such cases, reference may be made to the case of *Re Feltham's Trusts* (*f*), in which there was a bequest to "Thomas Turner, of Regency Square, Brighton," the facts being that there was a James Turner, of Regency Square, surgeon, and a Rev. Thomas Turner, of Daventry, both nephews of the testatrix's husband; an old will containing a bequest to "Thomas Turner, of Regency Square, Brighton, surgeon," was admitted to prove the fact that the testatrix always called the surgeon Thomas. From that fact the Court inferred that the actual will (which was not strictly applicable to either claimant), erred in the name and not in the description. Again, in *Re Gregory's Settlement* (*g*), where the testator bequeathed a legacy to "the youngest son of A B,"

(*b*) The question is whether the supplementary act is testamentary; *ante*, p. 123.

(*c*) [1837] *Stubbs* v. *Sargon*, 2 Kee. 255; 3 My. & Cr. 507; *ante*, p. 454.

(*d*) *Post*, p. 494.

(*e*) *Post*, pp. 1232 *seq.*

(*f*) 1 K. & J. 528.

(*g*) 34 Bea. 600. Other cases in which prior wills have been admitted in evidence are *Blundell* v. *Gladstone*, 1 Ph. 279; *S.C.*, *Lord Camoys* v. *Blundell*, 1 H. L. C. 778; *Reynolds* v. *Whelan*, 16 L. J. Ch. 434; *Re Waller*, 68 L. J. Ch. 526; *Flood* v. *Flood*, [1902] 1 Ir. R. 538.

by the wrong name, a former will was held admissible in evidence to prove that the testator knew of the state of the family of A B. And in *Re Ofner* (*h*), a memorandum in the testator's handwriting (being instructions for his will), was admitted in explanation of a misdescription of a legatee.

Re Ofner.

Re Waller (*i*) is another illustration of the same principle. There the testator bequeathed legacies to the unmarried daughters "of my late friend, Ignatius Scholes, deceased." There was a person called Ignatius Scholes, known to the testator, but he was alive at the date of the will and was a Jesuit priest. The testator had, however, been an intimate friend of Joseph John Scholes, the father of Ignatius Scholes; he was dead at the date of the will, and left five unmarried daughters, who were referred to by name in a former will of the testator, and it was held that these facts put it beyond doubt that the name "Ignatius Scholes" was a mistake for "Joseph John Scholes."

Re Waller.

The Court will admit evidence to show that the person named in the will is misdescribed, although there had existed a person known to the testator who fulfilled the description, but who was dead at the date of the will (*k*).

Person misdescribed.

Where there is a gift to A B, without any addition or description by which he can be distinguished or identified, and it cannot be found that there is any person of that name known to the testator, it seems that evidence is admissible to show that there is a person of a somewhat similar name known to the testator, and thus to lead to the inference that he is the person intended by the gift. In *Masters* v. *Masters* (*l*), the testator bequeathed a legacy to "Mrs. Sawyer," and as it could not be found that any person of that name was known to the testator, it was referred to the Master to inquire whether a Mrs. Swapper, by whom the legacy was claimed, was the person intended. So in *Beaumont* v. *Fell* (*m*), a testator bequeathed £500 to "Catherine Earnley," which was claimed by a person whose name was Gertrude Yardley; it appeared that there was no such person as Catherine Earnley; that the testator's voice, when he made his will, was hardly intelligible; that the testator usually called Gertrude Yardley by the name of "Gatty," and that he had often declared that he would do well for her. The M.R. admitted the evidence, and held Gertrude Yardley to be entitled. It seems clear that the evidence of the testator's intention to benefit Gertrude

No person answering description.

Beaumont v. *Fell.*

(*h*) [1909] 1 Ch. 60.
(*i*) 68 L. J. Ch. 526.
(*k*) *Re Halston*, [1912] 1 Ch. 435, not following *Re Ely*, 65 L. T. 452.
(*l*) 1 P. W. 425.
(*m*) 2 P. W. 141.

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Yardley was wrongly admitted, the case not falling within the rule which allows the admission of such evidence (*n*), but the decision itself seems to be in accordance with the principle on which *Dowset* v. *Sweet* and *Re Hooper* were decided (*o*). The authority of *Beaumont* v. *Fell* has indeed been questioned (*p*), and in *Mostyn* v. *Mostyn* (*q*), Lord Brougham treated it as having been overruled by *Miller* v. *Travers* (*r*). But it is submitted that the two cases rest on different principles; for in *Miller* v. *Travers* the evidence tendered would have contradicted the will, while in *Beaumont* v. *Fell* the evidence explained what was otherwise unintelligible (*s*). If in *Miller* v. *Travers* the testator had devised all his estates in the county (let us say) of Clane (there being no such county), would not evidence have been admissible to show that he had estates in the county of Clare, and thus to lead to the inference that he meant them to pass by the devise? It is sometimes said that the admission of such evidence is an infraction of the rule which requires wills to be in writing, but if so the rule is equally infringed by the admission of evidence to supply a partial blank in the name of a legatee (*t*).

Total blanks for names not to be supplied.

"But though, as we have seen," says Mr Jarman (*u*), "cases may be adduced in which legacies have been decreed to persons to whom not any part of the description in the will applies, yet in no instance has a total blank for the name been filled up by parol evidence (*x*). In such cases, indeed, there is no certain intent on the face of the will to give to *any* person : the testator

(*n*) *Post*, p. 494.

(*o*) *Post*, p. 1226.

(*p*) By Mr. Jarman, in the first edition of this work, p. 383; and by Lord Abinger, in *Doe* v. *Hiscocks*, 5 Mee. & W. p. 371. Mr. Wigram seems to think that the decision in *Beaumont* v. *Fell* was correct, except so far as the M.R. admitted evidence of the testator's declarations. In that respect the decision was, it is submitted, erroneous.

(*q*) 5 H. L. C. p. 168.

(*r*) 1 M. & Sc. 342.

(*s*) The distinction is clearly stated by Sir J. Strange in *Hampshire* v. *Peirce*, 2 Ves. sen. 216.

(*t*) *Post*, p. 491.

(*u*) First edition, p. 383.

(*x*) See Roper, 186, citing *Winne* v. *Littleton*, 2 Ch. Cas. 51; *Baylis* v. *Att.-Gen.*, 2 Atk. 239; *Ulrich* v. *Litchfield*, *ib.* 372; *Taylor* v. *Richardson*, 2 Drew. 16. The decision in *Re Bacon's Will*, 31 Ch. D. 460, appears to contradict the statement in the text. But the circumstances in that case were very peculiar. The testatrix, who was illegitimate and left no next-of-kin, made her will on a printed form, whereby, after giving certain legacies, she gave all her residue "unto to and for own use and benefit absolutely," and she nominated C "to pay all my debts, &c., to be executor of this my will." Probate of the will was granted to C as executor. It was held by Kay, J., that under the special circumstances of the case, parol evidence was admissible to rebut the presumption against the executor, and that C was beneficially entitled to the residue. As to the general rule in such cases, see *ante*, p. 474.

may not have definitely resolved in whose favour to bequeath the projected legacy (*y*).

Partial blanks supplied.

"The effect of partial or imperfect descriptions, however, has often come under consideration. In the case of *Hunt* v. *Hort* (*z*), where the bequest was to Lady , Lord Thurlow considered it as equivalent to a total blank, and, therefore, that the name could not be supplied by parol evidence. But in *Price* v. *Page* (*a*), where the Christian name only was omitted, the bequest being to Price, son of Price, Sir R. P. Arden, M.R., admitted the claim of a son of the testator's niece of that name, on parol evidence by which it appeared that the claimant had been brought up by the testator (who had no other relation of the name of Price), and had promised to provide for him (*b*). And in *Abbot* v. *Massie* (*c*), where the bequest was to Mr. and Mrs. G., Lord Loughborough directed an inquiry as to who Mrs. G. was. Of course, if there had been more than one person answering to the imperfect description in the will, and the evidence had failed to point out which of them was the intended object of the testator's bounty, the bequest would, in both the preceding cases, have been void for uncertainty" (*d*).

It is clear that blanks may be supplied by reference to the context of the will, and for this purpose the Court is entitled to look at the original will as well as at the probate copy (*e*).

Evidence sometimes admissible though immaterial.

At the conclusion of his judgment in *Blundell* v. *Gladstone*, the V.-C. said he decided the case upon the words of the will, coupled with that evidence only which had been given as to the state of the Weld family at the date of the will, and which he thought was the only part of the evidence which ought to be received (*f*). But besides that evidence, there was parol evidence (*g*) of the testator having, both before and after making his will, and even after the correction of his mistake, repeatedly

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(*y*) *Per* Parke, B., *Doe* v. *Needs*, 2 M. & Wels. 139.

(*z*) 3 Br. C. C. 311; see also 1 M. & Sc. 351.

(*a*) 4 Ves. 680. Compare *Gill* v. *Bagshaw*, L. R. 2 Eq. 746; *ante*, p. 447.

(*b*) *Sic* in the original text. It will be noticed that the M.R. admitted evidence that the testator had promised to provide for his niece's son, but this would probably not be allowed at the present day. See *post*, p. 492.

(*c*) 3 Ves. 148; see *Clayton* v. *Lord Nugent*, 13 M. & W. 200.

(*d*) The same rule was followed in *Phillips* v. *Barker*, 1 Sm. & G. 583. In *In b. De Rosaz*, 2 P. D. 66, the surname was left blank, the bequest being to "Percival ———, of Brighton," and evidence was admitted to show who was intended; and in *Estate of Hubbuck*, [1905] P. 129, where the testatrix gave all her property "unto my granddaughter ," and appointed her executrix, evidence was admitted to show which of the testatrix's three granddaughters was intended. See also *Phelan* v. *Slattery*, 19 L. R. Ir. 177; *Re Gregson's Trusts*, 2 H. & M. 504.

(*e*) *Re Harrison*, 30 Ch. D. 390; *Furniss* v. *Phear*, 36 W. R. 521.

(*f*) 11 Sim. 488.

(*g*) *Ib.* 470.

called the possessor of Lulworth by the name of Edward Weld. This evidence had been received in the Master's Office, and in delivering the opinion of the Judges in D. P. (where the suit was carried), Parke, B., said they thought it was rightly received (*h*). Hence it is to be inferred that evidence (to which, upon the principles discussed in this chapter, there is *per se* no objection) of facts connected with the case, and which may by possibility influence the construction of the will, is admissible, although ultimately it is found to be immaterial and has to be excluded from consideration (*i*).

Rule as to patent and latent ambiguities, how far conclusive in deciding on admissibility of evidence.

VIII.—Ambiguity—Evidence of Intention (*k*).—The admission or rejection of parol evidence is commonly said to depend in all cases on the canon, which rejects it in the case of *patent* ambiguities, or those which appear upon the face of the will, and admits it in the case of *latent* ambiguities, or those which seem certain, for anything that appears upon the face of the will, but there is some collateral matter, out of the will, that breeds the ambiguity (*l*). And this ambiguity being raised by parol evidence, may, it is said, be fairly removed by the same means. But upon examination the maxim proves not to be an universal guide; for, on the one hand, there are many recognised authorities for the admission of parol evidence to explain ambiguities appearing on the face of the will (*m*), while, on the other hand, the existence of a latent ambiguity will certainly not, as appears sometimes to have been supposed, warrant the admission in all cases indiscriminately of parol evidence to show what the testator meant to have written as distinguished from what is the meaning of the words he has used (*n*). It is to the admissibility of this species of evidence that attention is now to be turned. To say that such evidence is admissible, because the ambiguity complained of has been raised by the extrinsic facts, is to lose sight of the essential difference between the nature and effect of the evidence which raises the ambiguity, and that by which it is to be removed; for the former is confined to a development of facts with reference to which the will was written, and to which the language of the will expressly or tacitly refers; and, therefore, it

(*h*) 1 H. L. C. 778, *nom. Camoys* v. *Blundell.*

(*i*) See also *Lowe* v. *Lord Huntingtower*, 4 Russ. 532, n.; *Sayer* v. *Sayer*, 7 Hare, 381, Wigr. Wills, pl. 103.

(*k*) The two following paragraphs are taken verbatim from the third edition of this work, by Messrs. Wolstenholme and Vincent, pp. 399 *seq.*

(*l*) Bacon's Maxims, Reg. 23.

(*m*) *Doe* d. *Gord* v. *Needs*, 2 M. & Wels. 129; *Doe* d. *Smith* v. *Jersey*, 2 B. & B. 553; *Fonnereau* v. *Poyntz*, 1 Br. C. C. 472; *Colpoys* v. *Colpoys*, Jac. 451, Wigr. Wills, 65, 66, 178 ((5th ed.), pp. 71 *seq.*, 185 *seq.*), whence the views expressed in the text have been adopted.

(*n*) See cases, *ante*, p. 461, n. (*k*).

lies within the strict limits of exposition, which it cannot be denied that the latter transgresses (*o*). To render the ground tenable, it must be taken to support the proposition only so far as it asserts, that, if an ambiguity is introduced into an otherwise unambiguous will by parol evidence of the state of the testator's family, or other circumstances, that ambiguity may be removed by further evidence *of the same nature* (*p*). But in admitting this interpretation of the rule all distinction between patent and latent ambiguities is lost, for in *every* case the Judge by whom a will is to be expounded is entitled to be placed, by a knowledge of all the material facts of the case, as nearly as possible in the situation of the testator when he wrote it. A patent ambiguity, it is true, may not be explained by any other kind of evidence, and so far the first branch of the canon is undoubtedly true (*q*). But by our hypothesis to this precise extent, and no further, is the latter branch true also. We come, therefore, to the conclusion either that the distinction taken by the canon between latent and patent ambiguities is an unsubstantial one, or that the proposition does, in its second branch, assert the admissibility of evidence to show the testator's intention (as distinguished from the meaning of his written words); and that, consequently, if true, its application must be confined to a special class of cases.

It remains for us to see in what cases, if any, such evidence is admissible. Suppose, then, that evidence has been given of all the material facts and circumstances of the case, and that these have ultimately raised an ambiguity by disclosing the existence of more than one object or subject to which the words are equally applicable (*r*). The uncertainty as to which of these was in the testator's contemplation would, if the investigation stopped here, necessarily be fatal to the gift. Under these peculiar circumstances, however, declarations of the testator or other direct evidence of his intention are admissible to clear up the ambiguity, by pointing out (if they can) the actual subject

(*o*) See Wigr. Wills, 121; *per* Romilly, M.R., *Stringer* v. *Gardiner*, 27 Bea. 38.

(*p*) *Per* Alderson, B., 13 M. & Wels. 204.

(*q*) *Cheyney's Case*, 5 Rep. 68b; *Castledon* v. *Turner*, 3 Atk. 257; *Clayton* v. *Lord Nugent*, 13 M. & Wels. 200; *Strode* v. *Russell*, 2 Vern. 625.

(*r*) It is hardly necessary to point out that, in accordance with the general principle stated *ante*, p. 464, if there is an object or subject which correctly answers the description in the will, parol evidence is not admissible to show that the gift was intended to include another object or subject which it does not accurately describe; evidence of intention was rejected on this ground in *Horwood* v. *Griffith*, 4 D. M. & G. 700. See also *Re Mayo*, [1901] 1 Ch. 404, where a testator bequeathed property to the three illegitimate children of Mrs. A B. In fact, A B had four illegitimate children, but in the absence of any evidence to show that the testator knew of the existence of the eldest child, no ambiguity arose, and it was held that the other three were entitled. Farwell, J., seems to have doubted whether, if the ambiguity had arisen, evidence of intention would have been admissible. (Note by C. Sweet.)

CHAPTER XV.

"Equivocation."

or object of gift, among the several properties or persons answering to the description. Of this nature are the examples given by Lord Bacon, in illustration of the maxim, "*Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur*"; and are styled by him cases of equivocation (*s*).

Effect where there are two subjects or objects answering to description.

Thus, where a testator devises his manor of Dale, and it is found that he had at the date of his will two manors, North Dale and South Dale, evidence may be adduced to show which of them was intended (*t*). Again, if a testator, having two closes in the occupation of A, devises all that his close in A's occupation, evidence is admissible to prove which of the two closes he meant to devise (*u*).

If no sufficient evidence is forthcoming, the gift is void for uncertainty (*x*).

Evidence admitted to show which of two persons answering to the name was intended.

The same principle, of course, is applicable (and it has been most frequently applied) to the objects of a devise. Thus, in *Lord Cheyney's Case* (*y*), it was resolved that if a man have two sons, both baptised by the name of John, and, conceiving that the elder (who had been long absent) is dead, devises his lands, by his will in writing, to his son John, generally, and in truth the elder is living; in this case the younger son may produce witnesses to prove his father's intent, that he thought the other to be dead, or that he, at the time of the will made, named his son John the younger; for, observes Lord Coke, no inconvenience can arise, if an averment in such case be taken (*z*); because he who sees such will, ought at his peril to inquire which John the testator intended; which may easily be known by him who wrote the will, and others who were privy to his intent.

So, in *Jones* v. *Newman* (*a*), where a testatrix devised to John Cluer of Calcot. There were two persons, father and son, of that name, and evidence was admitted to show which was intended. One of them had subsequently died in the testatrix's lifetime; but, of course, that could not influence the construction. So, where a testator bequeathed a legacy to "W. R., his

Declarations of testator admitted.

(*s*) See, as to the meaning of the word *ambiguity*, Wigr. Wills. pl. 210; Cic. Q. Tusc. III 9.

(*t*) *Per* Tindal, C.J., in *Miller* v. *Travers*, 1 M. & Sc. 346.

(*u*) *Richardson* v. *Watson*, 4 B. & Ad. 787 (where the evidence was insufficient); *Asten* v. *Asten*, [1894] 3 Ch. 260; *ante*, p. 436.

(*x*) *Richardson* v. *Watson*, *supra*.

(*y*) 5 Rep. 68 b.

(*z*) "But the effect of the doctrine is to render it necessary to the completeness of a title derived under a devisee, that it should be ascertained that there is not more than one person answering to the description; but this is seldom attended to in practice, unless some discrepancy occurs between the terms of the will and the actual name or addition of the claimant." (Note by Mr. Jarman, 1st ed., p. 372.)

(*a*) W. Bl. 60.

farming man," and it appeared he had two farming men of that name, evidence of the testator's declarations in favour of one of them was admitted (*b*).

Doe v. *Morgan.*

Again, in *Doe* d. *Morgan* v. *Morgan* (*c*), where a testator devised certain property to his nephew Morgan Morgan, and then in the same will devised other property to his nephew Morgan Morgan, of the village of Mothvey. It appeared that the testator had two nephews of this name, one of whom lived at Mothvey, and the other elsewhere; it was contended that as the first devise was to Morgan Morgan *simpliciter*, and the second devise to Morgan Morgan of Mothvey, it was to be presumed that the testator in making this distinction had different persons in his contemplation, and that, this being apparent on the face of the will, parol evidence to the contrary was inadmissible; but the Court held that evidence of the testator's oral declarations, made at the time of the will, was admissible.

Doe v *Needs*

In *Doe* d. *Gord* v. *Needs* (*d*), there was a devise to George Gord, the son of John Gord; another to George Gord, the son of George Gord; and a third to George Gord, the son of Gord. The Court of Exchequer held, that evidence of the testator's declarations, that he intended George Gord, the son of George Gord, to take the property devised to George Gord, the son of Gord, was admissible: that it was clear the testator had selected a particular object of his bounty; though if there had been a blank before the name of Gord the father, that might have made a difference: that if there had been no mention in the will of any other George Gord, the son of a Gord, evidence of the testator's declarations would undoubtedly have been admissible, upon the authorities, which were all characterised by the fact that the words of the will did describe the object or subject intended, and the evidence of the testator's declarations had not the effect of varying the instrument in any way whatever; it only enabled the Court to reject one of the subjects or objects to which the description applied, and to determine which of the two the devisor understood to be signified by the description which he used in the will: that the mention in other parts of the will of two persons, each answering the description of George the son

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(*b*) *Reynolds* v. *Whelan*, 16 L. J. Ch. 434. The evidence was that by an earlier will, made before the unsuccessful claimant entered his service, the testator gave W. R., "one of my farming men," a legacy, and that before the date of his last will he told a witness that he had given "Old Will" £50, and intended to leave him £100; if the Court relied on the evidence as to the earlier will, the case does not properly belong here: see *per* Wood, V.-C., in *Re Feltham's Trusts*, 1 K. & J. 532, *ante*, p. 488.

(*c*) 1 Cr. & M. 235. Compare *Healy* v. *Healy*, Ir. R. 9 Eq. 418.

(*d*) 2 M. & Wels. 129. See also *Phillips* v. *Barker*, 1 Sm. & Gif. 583. In *Re Mayo*, [1901] 1 Ch. 404, Farwell, J., expressed doubts whether *Doe* v. *Needs* would be followed by the Court of Appeal at the present day.

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of Gord, had no more effect for this purpose than proof by extrinsic evidence of the existence of such persons, and that they were known to the devisor, would have had : and that though the claimant under the devise in question was more perfectly and fully described in another part of the will, still he was correctly, however imperfectly, described by that devise.

Doe v. *Allen.*

In *Doe* d. *Allen* v. *Allen* (*e*), a testatrix devised her land to her brother T. A. for his life, and after his decease to John A., grandson of her said brother T. A., his heirs and assigns, charged, nevertheless, with the bequest of £100 to each and every of the brothers and sisters of the said John A. At the time of making the will, there were two grandsons of T. A., each named John; but one of them, the lessor of the plaintiff, had brothers and sisters; the other, the defendant, had none : it was held, that the bequest to the brothers and sisters of the said John A. did not contain a description of the devisee, so as to exclude extrinsic evidence in favour of the defendant's claim, as it would have applied to after-born brothers and sisters; and that a declaration by the testatrix, of her intention in the defendant's favour, was admissible.

Contra where ground for preferring either is afforded by the will;

On the other hand, in *Doe* d. *Westlake* v. *Westlake* (*f*), where the devise unto "Matthew Westlake, my brother, and to Simon Westlake my brother's son"; and it appeared by the evidence, that the testator had three brothers, Thomas, Richard, and Matthew, each of whom had a son named Simon; Thomas and Richard were mentioned in previous parts of the will : the Court of King's Bench held (and that in perfect consistency with the preceding cases (*g*)), that the fact of there being several brothers' sons named Simon did not raise a latent ambiguity, so as to let in evidence of oral declarations made by the testator respecting his intention; it being clear, on the face of the will, that the nephew intended was the son of Matthew. "My brother's son" evidently meant the son of that brother who was then particularly in his mind.

—or by surrounding circumstances.

And the result would doubtless be the same where the evidence of surrounding circumstances disclosed reasons for the testator preferring one person to another of the same name (*h*) :

(*e*) 12 Ad. & Ell. 451. In *Bennett* v. *Marshall*, 2 K. & J. 740, the case of two persons, one with several Christian names, the other with only one, that one being identical with the first Christian name of the former, was considered to be the same as the case of two persons bearing the same name. It is not stated, however, what was the nature of the parol evidence admitted. See also *per* Malins, V.-C., *Webber* v. *Corbett*, L. R. 16 Eq. 518.

(*f*) 4 B. & Ald. 57; see also *Douglas* v. *Fellows*, Kay 114; *Webber* v. *Corbett*, L. R. 16 Eq. 518; and cf. *Fleming* v. *Fleming*, 1 H. & C. 242; *Healy* v. *Healy*, Ir. R. 9 Eq. 418.

(*g*) See Wigr. Wills, pl 144.

(*h*) *Careless* v. *Careless*, 1 Mer. 384; *Jefferies* v. *Michell*, 20 Bea. 15.

for there is properly no "ambiguity" until all the facts of the case have been given in evidence, and found insufficient for a definite decision (*i*).

Evidence of intention not admitted against rule of construction.

Again, if the person intended to be benefited can be ascertained by some definite rule of construction, evidence of intention is, it seems, inadmissible (*k*). For example, as Mr. Jarman observes (*l*), "relative pronouns, which have no independent force or signification, but whose effect depends wholly upon the position which they occupy in the instrument, cannot, by means of parol evidence, be shifted, so as to relate to a different antecedent. Thus, in *Castledon* v. *Turner* (*m*), where a testator had made dispositions in his will to several, and but two women were mentioned throughout the whole will, *viz.*, his wife and his niece, and, in the latter part of the will, a particular estate was devised to 'her' for and during her natural life—Lord Hardwicke refused to receive parol evidence for the purpose of showing to which of the two women 'her' referred; his Lordship thinking that the offering it was an attempt contrary to the principles of the Court, because it would tend to put it in the power of witnesses to make wills for testators. And his Lordship held, that, although 'her' was a relative term, it related to the wife, upon the ground that, throughout the will, in other places, 'her' seemed to relate to the wife" (*n*). So, where the gift is to "the two children of A," and A has four children, and there is nothing in the context of the will or the circumstances to show which two are meant, the ordinary rule applies (*o*), and all four children share in the gift: evidence of intention is therefore not admissible (*p*).

The rule that extrinsic evidence is admissible to prove that two legacies given by the same instrument to the same person were intended to be cumulative (*q*), but not to prove that two

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(*i*) Wigr. Wills, Prop. VI and VII.

(*k*) "Where the presumption arises from the construction of words simply, *qua* words, no evidence can be admitted": *per* Lord Thurlow, *Coote* v. *Boyd*, 2 Br. C. C. p. 527.

(*l*) First edition, p. 361.

(*m*) 3 Atk. 257, cit. 2 Ves. sen. 216.

(*n*) Parol evidence is also inadmissible for the purpose of raising a case of election, *Clementson* v. *Gandy*, 1 Kee. 309, *post*, pp. 520 *seq.*; or of showing that a person to whom property is given upon terms which imply a trust was intended to take beneficially: *Barrs* v. *Fewkes*, 34 L. J. Ch. 522.

(*o*) *Post*, p. 1682.

(*p*) *Matthews* v. *Foulshaw*, 11 L. T. 82, citing *Daniell* v. *Daniell*, 3 De G. & S. 337, where, however, the point was not decided. In *Re Mayo*, [1901] 1 Ch. 404, the point did not arise, but Farwell, J., expressed an opinion that evidence of intention is not admissible in these cases. *Hampshire* v. *Peirce*, 2 Ves. sen. 216, was wrongly decided on this point: 5 M. & W. 371.

(*q*) Mr. Hawkins doubts this. See Hawkins on Wills, 3rd ed., p. 355.

CHAPTER XV.

Doubtful decision of Malins, V.-C.

legacies given by different instruments to the same person were intended to be substitutional, rests on the same principle (*r*).

In *Webber* v. *Corbett* (*s*) there was a specific bequest to "my niece Clara" and another to "my niece Laura" both of them being described as daughters "of my brother John Webber"; in a later part of the will there was a legacy of £50 "to each of my nieces Kate G., Hannah T., Harriet Bird, and Laura Webber," and a bequest of £100 to "each of my nieces the said Clara Webber, Laura Webber," and others, and "the said Laura Webber" was one of the residuary legatees; in addition to Laura Webber, the daughter of John, the testatrix had a niece Laura F. T. Webber, whom she was in the habit of calling Laura; this Laura Webber and Kate G., Hannah T., and Harriet Bird were daughters of William Webber. Malins, V.-C., held that Laura, the daughter of John Webber, was entitled under all the gifts. The decision seems open to question; the V.-C. himself thought that the fact of the legacies of £50 being given to persons who were all daughters of William, and the absurdity of giving separate legacies of £50 and £100 to the same person, pointed strongly to the conclusion that the legacy of £50 was intended for Laura F. T. Webber, but he laid it down as a general rule of construction that where a legatee is once accurately described in a will, every subsequent reference to a person of that name must mean the legatee so described. It is submitted that there is no such rule.

To "my brother," etc., the testator having several brothers.

"There seems to be no doubt," says Mr. Jarman (*t*), "though it has never been distinctly decided, that the principle of the preceding cases (*u*) applies to a devise to a person sustaining a given character, as 'to my brother, son,' etc., without specification of name; so that if the fact should happen to be, that there were more persons than one to whom the description applied, parol evidence would be admissible to show which of them was the intended object of gift; for, as the uncertainty does not appear until the parol evidence discloses the plurality of persons answering to the terms of the will, it seems to be an instance of the *ambiguitas latens*. In several reported cases, indeed, devises of this kind have failed, on account of the uncertainty of the object; but in none of them does parol evidence appear to have been offered to remove the ambiguity.

(*r*) *Hurst* v. *Beach*, 5 Madd. 351; *Lee* v. *Pain*, 4 Ha. 201. "In all these cases the evidence is received in support of the apparent effect of the instrument, and not against it," *per* Leach, V.-C., *Hurst* v. *Beach*, *supra*. As to *Hubbard* v. *Alexander*, 3 Ch. D. 738, see *post*, p. 1094.

(*s*) L. R. 16 Eq. 515.

(*t*) First edition, p. 375.

(*u*) *Lord Cheyney's Case*, *Jones* v. *Newman*, and *Doe* v. *Morgan*, *ante*, pp. 494, 495.

"Thus, in *Dowset* v. *Sweet* (*x*), a bequest to the son and daughter of W. W. was held to be void as to the son, on account of there being more than one. So, in *Doe* d. *Hayter* v. *Joinville* (*y*), one of the grounds on which the devise to the testator's 'brother and sister's family' failed was, that there were children of two sisters of the testator, one living and one dead, and it did not appear which of them was intended."

In *Phelan* v. *Slattery* (*z*), where a testator devised property to "my nephew," evidence was admitted to show which nephew was intended. But in *Estate of Hubbuck* (*a*), where the gift was to "my granddaughter ," evidence of intention was admitted on the ground of the blank, and Gorell Barnes, P., seemed to think that if the gift had been to "my granddaughter" simply, the evidence would have been inadmissible. It is submitted, however, that Mr. Jarman's statement of the principle is correct, and that it is supported by the authority of Lord Thurlow (*b*).

In b. Hubbuck.

In *Re Jeffery* (*c*) the gift was to A and B and their daughter. They had five daughters : evidence was admitted to show which daughter was intended.

Mr. Jarman continues (*d*) : "Sometimes it happens that one part of the description applies to each of the several claimants in common, and another part to neither of them; as in the case of *Still* v. *Hoste* (*e*), where a testator bequeathed a legacy to *Sophia* Still, daughter of Peter Still. Still had two daughters only, *Selina* and Mary Anne; and, upon evidence of Selina being intended by the testator, she was held to be entitled. It is clear that, if Selina had been the only daughter, her claim might have been supported on the terms of the will, without the aid of extrinsic evidence."

Where part of description applies to each of several persons, and part to neither, evidence admitted.

So, in *Price* v. *Page* (*f*), where a testator gave a legacy to —— Price, the son of —— Price. The report states that the plaintiff was the only person who claimed the legacy, but the executors raised the question whether the father of the plaintiff, to whom the description was equally applicable, was not

(*x*) Amb. 175.
(*y*) 3 East, 172. The decision in *Re Stephenson*, [1897] 1 Ch. 75, also seems to have proceeded on the absence of evidence of intention.
(*z*) 19 L. R. Ir. R. 177
(*a*) [1905] P. 129; *ante*, p. 491, n. (*d*).
(*b*) In *Delmare* v. *Robello*, 1 Ves. jun. 415.
(*c*) [1914] 1 Ch. 375.
(*d*) First edition, p. 378.
(*e*) 6 Mad. 192. The evidence was that of the attorney who made the will, and another person : the question was referred to the Master. See also *In b. Brake*, 6 P. D. 217
(*f*) 4 Ves. 679.

intended. Evidence was admitted and relied on by Sir R. P. Arden, M.R., that the testator had said that he had provided or would provide for the plaintiff, and that he had left him something by his will.

Of the two cases last cited, it was said by Lord Abinger, C.B. (*g*), that they did not materially differ from the class immediately preceding. That they differed indeed in this, that the equivocal description was not entirely accurate (*h*); but they agreed in its being (although inaccurate) equally applicable to each claimant; and that they all concurred in this, that the inaccurate part of the description was either, as in *Price* v. *Page*, a mere blank, or, as in the other two cases, applicable to no person at all. That these, therefore, might fairly be classed also as cases of equivocation, and in that case evidence of the intention of the testator seemed to be receivable.

Where part of description applies to one and part to another, evidence of intention is inadmissible.

There is yet another class of cases in which it has been made a question, whether evidence of the nature now under consideration can be legally admitted, namely, where the description in the will, taken altogether, answers to no person or thing, but part of it applies to one, and part to another. Cases are to be met with, supporting the conclusion, that a testator's declarations are admissible to show which of the imperfectly-described persons or things he intended to be the object or subject of the gift (*i*). But in *Doe* d. *Hiscocks* v. *Hiscocks* (*k*), where part of the description in the will applied to one person and part to another, the Court of Exchequer rejected evidence of the testator's declarations, at the time of giving instructions for his will, respecting his actual intention. The devise was to the testator's son John H. for life, and on his decease to his (testator's) grandson John H., eldest son of the said John H. for life, and on his decease to the first son of the body of his said grandson John H., in tail male, with other remainders over. At the time of making the will, the testator's son John H. had been twice married; he had by his first wife one son, Simon; by his second wife an eldest son John, and other younger children, sons and daughters. It was held, that evidence of the instructions given by the

Doe v. *Hiscocks*.

(*g*) In *Doe* v. *Hiscocks*, 5 M. & Wels. 370. His remarks included *Careless* v. *Careless*, 1 Mer. 384, but in that case evidence of intention was not required: *ante*, p. 496.

(*h*) Legal certainty, not perfect accuracy, is required, see Wigr. Wills, pl. 186.

(*i*) *Thomas* d. *Evans* v. *Thomas*, 6 T. R. 678; *Bradshaw* v. *Bradshaw*, 2 Y. & C. 72; in *Doe* d. *Le Chevalier* v. *Huthwaite*, 8 Taunt. 306, 2 Moo. 304, 3 B. & Ald. 632, sometimes cited in support of the same doctrine, it does not appear that any declarations by the testator were offered in evidence The case is said to have been ultimately compromised, *per* Lord Brougham, 1 H. L. C. 797.

(*k*) 5 M. & Wels. 363.

testator for his will, and of his declarations after its execution, was not admissible to show which of these two grandsons was intended by the description in the will. Lord Abinger, in delivering the judgment of the Court, reviewed most of the principal cases on this subject. In the opinion of the Court there was but one case, in which evidence was admissible, of the testator's declarations, of the instructions given for his will, and other circumstances of the like nature, which were not adduced for explaining the words or meaning of the will, but either to supply some deficiency or remove some obscurity or ambiguity. That case was where the meaning of the testator's words was neither ambiguous nor obscure, and where the devise was, on the face of it, perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arose as to which of the two or more persons or things, each answering the words in the will, the testator intended to express. Though it was clear he meant one only, both were equally denoted by the words, whence there arose an "equivocation," and evidence of previous intention might be received to solve this latent ambiguity; for the intention showed what he meant to do; and when you knew that, you immediately perceived that he had done it by the words he had used, and which in their ordinary sense might properly bear that construction. It appeared to them that in all other cases parol evidence of what was the testator's intention ought to be excluded. This case is generally considered to have settled the law upon this subject (*l*), and to decide that "the only cases in which evidence to prove intention is admissible, are those in which the description in the will is unambiguous in its application (*i.e.*, equally applicable in all its parts) to each of several subjects" (*m*).

The rule stated.

So in *Re Taylor* (*n*), a testatrix gave a share of her residuary property to her "cousin Harriet Cloak"; the share was claimed by two persons, *viz.*, Harriet Crane, whose maiden name was Cloak, and who was a first cousin of the testatrix, and Harriet Cloak, who was herself not related to the testatrix, but had married Thomas Cloak, who was a first cousin of the testatrix; it was held that extrinsic evidence of the intimacy between the testatrix and the respective claimants was admissible, and that

Re Taylor.

(*l*) Wigr. Wills, pl. 215; *Blundell* v. *Gladstone*, 11 Sim. 467, 470, 1 Phil. 282; *Thomson* v. *Hempenstall*, 13 Jur. 814; *Drake* v. *Drake*, 8 H. L. C. 172; *Bernasconi* v. *Atkinson*, 10 Hare, 348; *Charter* v. *Charter*, L. R. 7 H. L. 364, 377; *In b. Brake*, 6 P. D. 217; *In b. Chappell*, [1894] P. 98. In *Re Blackman*, 16 Bea. 377, the rule was transgressed, but the decision seems right without the questionable evidence: see *post*, p. 1223.

(*m*) *Re Ray*, [1916] 1 Ch. 461, at p. 465. See *Re Jeffery*, [1914] 1 Ch. 375, stated *ante*, p. 449.

(*n*) 34 Ch. D. 255.

Harriet Cloak, the wife of T. Cloak, was entitled to the share. Sir H. Cotton, L.J., in that case observed as follows (*o*): "Evidence of the testatrix's expressions of intention before and after the making of the will is not admissible. Such evidence of intention is only admissible where the words are equally applicable to two or more persons, which is not the case here, where the words are not strictly applicable to any person. But evidence of the surrounding circumstances and of the knowledge of the testatrix is admissible."

Re Ray.

In *Re Ray* (*p*) the testatrix gave No. 83 Cambridge Road to her great nephew Edward Johnson. She had no relations of the name of "Johnson," but had a niece Elizabeth Johnstone, who had three sons, Robert William Johnstone, Joseph Francomb Johnstone (known as "Frank"), and Richard Johnstone. It was held, that extrinsic evidence was admissible to show the intention of the testatrix that Joseph Francomb Johnstone was the person to take No. 83 Cambridge Road.

Declarations need not be contemporaneous with will.

Where evidence of intention is admissible, it is no objection to its reception that the declarations relied on were subsequent to the making of the will. In the case of *Doe* v. *Allen* (*q*), the declarations admitted as evidence had been made by the testatrix ten months after the date of her will, and were objected to on that account. Lord Denman, C.J., concluded the judgment of the Court by saying, that "none of the cases which were referred to in the books to show that declarations contemporaneous with the will were alone to be received, established such a distinction. Neither had any argument been adduced which convinced the Court that those subsequent to the will ought to be excluded wherever any evidence of declarations could be received. They might have more or less weight according to the time and circumstances under which they were made, but their admissibility depended entirely on other considerations." The same remarks would apply to declarations made before the will (*r*).

Rule where there is a person answering to the description.

It was stated in a former page that evidence of all the material facts of the case was admissible to assist in the exposition of the will. And this statement was necessarily qualified by the insertion of the word "material," because though the rules specially applicable to the subject now under consideration, may not raise any peculiar obstacle to the admission of evidence

(*o*) *Ib.*, at p. 258.

(*p*) [1916] 1 Ch. 461.

(*q*) 12 Ad. & El. 455; Wigr. on Wills (5th ed.), 175. See *Re Fletcher*, [1917] 1 Ch. 339, at p. 347.

(*r*) *Langham* v. *Sanford*, 19 Ves. 649; 2 Tayl. Evid. p. 1009 (7th ed.). Lord Kenyon's *dictum*, *Thomas* v. *Thomas*, 6 T. R. 677, seems therefore to be overruled.

tendered in support of a given fact; yet if that fact, supposing it to be proved, ought not to influence the construction of the will, the evidence in support of it is immaterial, and therefore inadmissible. Thus it is a well-known rule, that words shall be interpreted in their primary sense, if the context and surrounding circumstances do not exclude such an interpretation, even though the most conclusive evidence of intention to use them in some popular or secondary sense be tendered (*s*). Therefore a person, to whom the terms of the description are imperfectly applicable, may not, by parol evidence of facts tending to prove an intention in his favour, support his claim against another person exactly or more nearly answering to all the particulars in the description.

Delmare v. *Robello.*

Thus, in *Delmare* v. *Robello* (*t*), where a testator in 1785 bequeathed the residue of his estate, in trust to pay the interest for life to all the children of his two sisters, Reyne and Estrella; in case of the death of any, their issue to have their respective shares, with benefit or survivorship for want of issue. The testator died in 1789, leaving three sisters: Reyne, who was never married, but in 1757 changed her profession of religion from the Jewish to the Roman Catholic persuasion, and became a professed nun, and was baptised by the name of Maria Hieronyma, and lived at Genoa; and Estrella and Rebecca, who were married, and lived at Leghorn. Rebecca had several children who set up a claim on the ground that the testator intended Rebecca when he named Reyne. Parol evidence of the circumstances as well as of the testator's declarations in support of this claim was rejected by Lord Thurlow, who suggested that Maria Hieronyma might have changed her mind, and have escaped into this country, and have married and had children, notwithstanding her vow. He decided, therefore, that the claim of the children of Rebecca was untenable, inasmuch as there was a sister answering to the name in the will; for he considered that the assumption of the conventual name did not prevent the applicability of the former name: it was a part of the profession,

(*s*) Wigr. Wills, Prop. II, *supra*. And see *Horwood* v. *Griffith*, 4 D. M. & G. 708. In *Grant* v. *Grant*, L. R. 5 C. P. 727, Blackburn, J., cited with approval "Blackburn on Contracts," where it is said that in applying the rule a distinction must be observed between contracts and wills, and a greater latitude allowed in construing wills, because in them the testator soliloquised, but that in a contract each party spoke to the other; and accordingly it was held in that case that "nephew" meant "wife's nephew," although it would not have been insensible with reference to extrinsic circumstances if it had been strictly interpreted. The decision in *Grant* v. *Grant* seems to have been approved by James, L.J., in *Sherratt* v. *Mountford*, L. R. 8 Ch. 928. However, in *Wells* v. *Wells*, L. R. 18 Eq. 504, Sir G. Jessel, M.R., reaffirmed Sir J. Wigram's proposition and declined to follow *Grant* v. *Grant*. See also the doubt thrown on *Grant* v. *Grant*, by Cotton, L.J., in *Re Taylor*, 34 Ch. D., at p. 257, and in *Re Parker*, 17 Ch. D. 262, and the discussion in *In b. Ashton*, [1892] P. 83.

(*t*) 1 Ves. jun. 412.

and was not meant for the rest of the world; the former name, therefore, continued, and by that such persons were always spoken of.

Evidence not admissible to exclude a person answering to description.

So, in *Andrews* v. *Dobson* (*u*), where the bequest was to "James, son of Thomas Andrews, of Eastcheap, printer." There was no person by the name of Thomas Andrews in Eastcheap, but there was James Andrews, a printer, who lived there: he had one son, named Thomas, by his first wife, who was related to the testator; he had also a son by a second wife, named James, who was in no manner related to the testator. The son by the first wife claimed the legacy, insisting that the testator meant "Thomas, the son of James," instead of "James, the son of Thomas"; and prayed some inquiry respecting the circumstances; but Sir L. Kenyon, M.R., said that though there were cases in which legacies were left to persons by nicknames, and evidence had been admitted to show that the testator usually called them thereby, yet he thought that this was beyond all precedent, and dismissed the bill.

In this case there could have been no doubt as to the identity of the father: but the difficulty was in admitting the claim of a son of a different name, there being a son of the name used by the testator.

In *In b. Peel* (*x*), the testator appointed as one of his executors Francis Courtenay Thorpe, of Hampton, gentleman; it appeared that this description applied to a youth of twelve years of age; the Court refused to admit evidence to show that the testator intended to appoint the father of the youth, whose name was Francis Corbet Thorpe.

Holmes v. *Custance.*

Again, in *Holmes* v. *Custance* (*y*), where there was a legacy to the children of Robert Holmes, "late of Norwich, but now of London." It appeared that, at the date of the will, the testator had no relative named Robert, but that a person of this name, who was related to the testator, and had gone from Norwich to London, at the age of fourteen or sixteen, had died in London, a few years before, leaving a child. It was contended that the legacy did not apply to the child of this person, but to the children of George Holmes, who was a relative of the testator, had been formerly of Norwich, and was then resident in London, and had several children, some of whom were in habits of intimacy with the testator; but Sir W. Grant held that the description was not so inapplicable to Robert, as to let in

(*u*) 1 Cox, 425.
(*x*) L. R. 2 P. & D. 46.
(*y*) 12 Ves. 279; see also *Doe* v. *Westlake*, 4 B. & Ald. 57, *ante*, p. 496; *Re Ingle's Trust*, L. R. 11 Eq. 578; *Re Chenoweth*, 17 T. L. R. 515.

evidence that George was the person intended; that the sense of "late" was not "recently" but "formerly"; and as to his being dead at the time, that the testator might not have known or might have forgotten it, he being at a distance.

Charitable institutions.

Testators frequently describe a charitable institution by an inaccurate name, and then evidence is admissible to show what institution was intended (*z*). In *Re Bateman* (*a*) the testatrix bequeathed part of her residuary estate to "the Royal Hospital for Women." Six institutions claimed. Joyce, J., held that evidence of her instructions to her solicitor was not admissible as there was no "equivocation" and directed a scheme.

When the description accurately fits one person or society and does not accurately fit the other person or society, it requires cogent evidence to induce the Court to prefer the former to the latter (*b*). It is difficult to see why in such a case evidence should be admissible.

Wilson v. *Squire*.

In *Wilson* v. *Squire* (*c*), where a testator bequeathed a legacy to "The London Orphan Society in the City Road," and it appeared that there was no institution precisely answering this description, but there was one in the City Road called the Orphan Working School, which claimed the legacy: evidence was tendered that there was a society called the London Orphan Asylum at Clapton, and that the testator was many years a subscriber to it, and in his lifetime avowed his intention of leaving it a legacy; but Sir J. K. Bruce held, that the Orphan Working School was sufficiently described by the will, and therefore that none of the evidence was admissible.

Two claimants, one legitimate, the other illegitimate.

On the same principle, if a testator refers to "my nephew A B," and it appears that he has two nephews of that name, one legitimate and the other illegitimate, there is as a general rule no ambiguity, for *prima facie* "nephew" means a legitimate nephew, and therefore in such a case evidence is not admissible to show that the testator intended to refer to his illegitimate nephew (*d*). But it may appear from the language of the will that the testator applied the description of "nephew" to his legitimate and illegitimate nephews indiscriminately, and in such a case evidence is admissible to show that in referring to "my

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(*z*) *British Home for Incurables* v. *Royal Hospital for Incurables*, 90 L. T. 601; *Re The Clergy Society*, 2 K. & J. 615; *Re Kilvert's Trust*, L. R. 7 Ch. 170; *Re Bradley*, 3 T. L. R. 668; *Re Raven*, [1915] 1 Ch. 673; *Re Ofner*, [1909] 1 Ch. 65.

(*a*) 27 T. L. R. 313.

(*b*) *National Society for the Prevention of Cruelty to Children* v. *Scottish National Society for the Prevention of Cruelty to Children*, [1915] A. C. 207.

(*c*) 1 Y. & C. C. C. 654.

(*d*) *Re Fish*, [1894] 2 Ch. 83.

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nephew A B" the testator intended to refer to his illegitimate nephew of that name (*e*).

Henderson v. *Henderson.*

This doctrine was carried even further in the case of *Henderson* v. *Henderson* (*f*). There the testator gave property for the benefit of his grandson, Robert William Henderson; he had a grandson of that name, and also a grandson named William Robert Henderson; it was held that evidence was admissible to show that the testator was in the habit of calling the latter Robert William, and also to show that he intended to benefit William Robert, and not Robert William. The decision seems contrary to the principle recognised in *Charter* v. *Charter.* It is true, as Lord Selborne remarked in that case, that the principle does not rest on a rational foundation, but it is clearly established.

Evidence of intention inadmissible to support claim of one to whom no part of description applies.

And even where no person actually answers to any part of the description in the will, it would seem, upon principle, to be impossible to admit parol evidence of intention in support of the claim of one to whom the description is in every respect inapplicable: for the will ought to be made in writing; and if the testator's intention cannot be made to appear by the writing, explained by the circumstances, there is no will (*g*).

Thus, Sir John Strange (*h*), in citing a case where the executor constituted in a will was "my nephew Robert New," which in the engrossing was written "Nune," and parol evidence was admitted, and thereupon New was declared the person meant, observed, that this would hardly have done, if it had not been for the relative words "my nephew," and its appearing that New was the testator's nephew, and that he had no such nephew as Robert Nune.

Same rule as to subject of gift.

Again, in *Miller* v. *Travers* (*i*), a testator devised all his freehold and real estates whatsoever, situate in the county of Limerick, and in the city of Limerick, to trustees and their heirs. At the time of making his will, the testator had no real estate in the county of Limerick but he had considerable real estates in the county of Clare: and it was held by Lord Brougham, L.C., assisted by Tindal, C.J., and Lord Lyndhurst, C.B., that evidence to prove that the testator intended his estates in the county of Clare to pass by the devise, and that

(*e*) *In b. Ashton*, [1892] P. 83.
(*f*) [1905] 1 Ir. R. 353. See *Re Bowman*, 8 T. L. R. 117.
(*g*) *Per* Lord Abinger, *Doe* v. *Hiscocks*, 5 M. & Wels. 369.
(*h*) *Hampshire* v. *Peirce*, 2 Ves. sen. 216.
(*i*) 8 Bing. 244; 1 M. & Sc. 342. The judgment of Tindal, C.J., contains a full and able examination of the authorities. See also *Okeden* v. *Clifden*, 2 Russ. 309; *Re Clergy Society*, 2 K. & J. 615; *Re Mayo*, [1901] 1 Ch. 404; *Barber* v. *Wood*, 4 Ch. D. 885.

the word "Limerick" was inserted by mistake instead of "Clare," was not admissible.

Evidence of state of facts admissible in such a case.

But this rule does not prevent the admission of parol evidence to show that the description in the will was inserted by mistake, and that there is a person answering a similar name or description who stood in such a relation of friendship or intimacy to the testator as to lead to the conclusion that he is the person whom the testator intended to benefit (*k*).

The limits of the doctrine are also illustrated by the case of *Re Ofner* (*l*), where a contemporaneous memorandum in the testator's handwriting was admitted as evidence to identify a person wrongly described in the will; the fact that this memorandum happened to be instructions for the will was held not to make it inadmissible.

(*k*) *Ante*, p. 489.
(*l*) [1909] 1 Ch. 60; *Re Crawley*, [1920] 1 Ir. R. 78.

CHAPTER XVI.

ELECTION AND ESTOPPEL.

Election.

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Extent of the general doctrine.

I.—Nature and Extent of the Doctrine.—Although Mr. Jarman states the general doctrine of election, he does not deal with it except so far as it is applicable to a particular class of cases, namely, where a testator disposes of his own property, and also professes to dispose of property which does not belong to him. There are, however, other classes of cases to which the doctrine is applicable. Some of them are referred to in connection with appointments under powers (*a*). Questions with regard to election also arise where persons to whom benefits are given by will have claims on the testator arising out of a transaction entered into by him during his lifetime; as in the case where a father, on the marriage of one of his children, covenants to settle property on the child, and afterwards gives benefits to that child by his will. This subject is considered elsewhere (*b*).

Limits of the doctrine.

The limits of the general doctrine were discussed in *Wollaston* v. *King* (*c*), where James, V.-C., said : " The rule laid down by the Master of the Rolls in *Whistler* v. *Webster* (*d*), is, in general

(*a*) Chap. XXIII.

(*b*) Chap. XXXII. The cases where an infant is put to her election whether she will take under or against a settlement made on her marriage (as in *Barrow* v. *Barrow*, 4 K. & J. 409; *Codrington* v. *Codrington*, L. R. 7 H. L. 854; *Carter* v. *Silber*, [1891] 3 Ch. 553; [1892] 2 Ch. 278; *Edwards* v. *Carter*, [1893] A. C. 360; *Viditz* v. *O'Hagan*, [1899] 2 Ch. 569; [1900] 2 Ch. 87, and cases there cited) do not fall within the scope of this work.

(*c*) L. R. 8 Eq. 165, 174. See Gray, Perp. § 561a.

(*d*) 2 Ves. jun. 367.

terms, 'that no man shall claim any benefit under a will without conforming, so far as he is able, and giving effect to everything contained in it whereby any disposition is made showing an intention that such a thing shall take place' (*e*). This rule, expressed in these terms, was certainly not applied in the case of *Carver* v. *Bowles* (*f*) and the cases which followed it. There it was clear that certain persons were intended to take benefits under the will, and other persons were allowed to take other benefits without conforming to, and giving effect to, the first dispositions, and, in fact, after defeating them. But why? The only intelligible principle which I can find is that it was held that the failure of the first dispositions, so far as they failed, did, under the will itself, enure for the benefit of the legatees; that the legatees were allowed to retain both benefits because they took both as legatees under the will itself without calling in aid any other instrument or any adverse title. It results in this, that the rule as to election is to be applied as between a gift under a will and a claim *dehors* the will, and adverse to it, and is not to be applied as between one clause in a will and another clause in the same will."

Questions of election sometimes arise where a testator makes a bequest or devise to A on condition that A releases some right or transfers some property of his to B; here A must elect whether he will comply with the condition or forfeit the gift under the will (*g*).

Condition.

In *Central Trust & Safe Deposit Company* v. *Sinclair* (*h*), a half interest in freehold property in Toronto was conveyed to the owner of the other half interest by his niece in consideration of a promise in writing that she should be paid half the rent during her life, and that on her death a half interest in the property should be conveyed to her heir, and that the grantee should so provide by his will. Half the rent was paid to the niece by the grantee until his death in 1912. In 1909 the niece wrote a letter which was held to mean that she was willing to accept an annuity of 1,200 dollars and a legacy of 20,000 dollars to her children after her death in lieu of the half interest in the property. By his last will the grantee left the niece an immediate legacy of 20,000 dollars but no interest in the

(*e*) See *Re Macartney*, [1918] 1 Ch., at pp. 304, 305.

(*f*) 2 Russ. & My. 301.

(*g*) *Wilkinson* v. *Dent*, L. R. 6 Ch. 339, where *East* v. *Cook*, 2 Ves. sen. 30, is explained; *Boughton* v. *Boughton*, 2 Ves. sen. 12; *Coote* v. *Gordon*, Ir. R. 11 Eq. 279; *Thornton* v. *Thornton*, 11 Ir. Ch. 474; *Cosby* v. *Lord Ashtown*, 10 Ir. Ch. 219; *Re Earl of Sefton*, [1898] 2 Ch. 378. A condition that a certain fund or property shall be brought into hotchpot obviously does not give the legatee a right of election: *Middleton* v. *Windross*, L. R. 16 Eq. 212.

(*h*) [1916] A. C. 266.

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property. Held that the niece must elect between the legacy and the half interest in the property since it was concluded from the circumstances that the legacy was left to the niece on the footing that she had relinquished, or would relinquish, her interest in the property, and that she knew it was so left.

Right of selection.

The cases in which one of several houses, pieces of land, chattels, or other kinds of property, is devised or bequeathed in such a way that the devisee or legatee has a right to select which he will take, are discussed elsewhere (*i*).

Doctrine of election, what.

"The doctrine of election," says Mr Jarman (*k*), "may be thus stated: That he who accepts a benefit under a deed or will, must adopt the whole contents of the instrument (*l*), conforming to all its provisions, and renouncing every right inconsistent with it. If, therefore, a testator has affected to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatee accepting the benefit so given to him must make good the testator's attempted disposition; but if, on the contrary, he choose to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him, for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights.

"An anonymous case in Gilb. Cas. in Eq. (*m*) furnishes a simple illustration of the principle. A seised of two acres, one in fee, and the other in tail, and having two sons, by his will devised the fee-simple acre to his eldest son, who was issue in tail, and the entailed acre to his youngest son, and died. The eldest son entered upon the entailed acre, whereupon the younger son brought his bill against his brother, that he might enjoy the entailed acre devised to him, or else have an equivalent out of the fee acre; because his father plainly designed something for him. Lord Cowper said, 'The devise of the fee acre

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(*i*) *Ante*, p. 435.

(*k*) First edition of this work, p. 385. The two leading cases of *Noys* v. *Mordaunt*, 2 Vern. 581, and *Streatfield* v. *Streatfield*, C. t. Talb. 176, are given in White and Tudor's L. C. with valuable notes.

(*l*) The "instrument" may consist of several documents carrying out one entire disposition: *Re Woodleys*, 29 L. R. Ir. 304, in which *Kirkham* v *Smith*, 1 Ves. sen. 258, and *Bacon* v. *Cosby*, 4 De G. & S. 261, are cited. As to the doctrine in Scotland, see *Pitman* v. *Ewing*, [1911] A. C. 217.

(*m*) *Anon.*, Gilb. Cas. Eq. 15; see also Pre. Ch. 351; Belt's Suppl. to Ves. 250; 2 P. W. 199; 1 Ves. sen. 234; 1 Br. P. C. Tom. 300; 3 *ib.* 167; Amb. 388, 1 Ed. 532; 3 Br. C. C. 316; *Blake* v. *Bunbury*, 4 Br. C. C. 21; *Wilson* v. *Lord Townshend*, 2 Ves. jun. 693; 5 Ves. 515; *Thellusson* v. *Woodford*, 13 Ves. 209; 1 Dow, 249; *Dillon* v. *Parker*, 1 Sw. 359, and *Gretton* v. *Haward*, *ib.* 409, with Mr. Swanston's celebrated notes; *Abdy* v. *Gordon*, 3 Russ. 278; 2 Drew. 93.

to the elder must be understood to be upon the tacit condition, that he shall suffer the younger son to enjoy quietly, or else that the younger son shall have an equivalent out of the fee acre.' And he decreed the same accordingly." This case is the more remarkable, as showing the length to which the doctrine of election has been carried; because the elder son was actually entitled to both acres by his better title as general or special heir, and took nothing under the will. Yet the mere intention to give him property by the will was held sufficient to put him to his election (*n*).

Does not extend to derivative claims.

But a devisee or legatee is not precluded from claiming derivatively, through another, property which such other person has taken in opposition to the will. Thus, a man may be tenant by the curtesy, in respect of an estate of inheritance taken by his wife in opposition to a will under which he has accepted benefits, without affecting his title to those benefits (*o*). For compensation having once been made by the wife (*p*) cannot be exacted a second time. And a devisee or legatee who claims derivatively through another to whom the will gave nothing is equally free; for whether the true owner took subject to an obligation which he has discharged, or subject to no obligation whatever, can make no difference: thus one co-heiress electing to take under a will, may retain a share which since the testator's death has descended to her from a deceased co-heiress, although bound to give up her own original share (*q*).

It must, however, be understood that the obligation attaches on whoever at the testator's death is true owner of the property wrongfully disposed of, and to whom also a benefit is given by the will. This is the point of time to be regarded. And it matters not from whom, or by what previous acts or devolutions, such owner's title was derived (*r*).

Intention of testator.

The doctrine does not depend on any supposed intention of the testator, but is based on a general principle of equity. Consequently the obligation of election extends to the whole of the benefits taken under the two instruments or titles (*s*).

Election by several persons.

If the property which the testator affects to dispose of

(*n*) See *Schroder* v. *Schroder*, Kay, 584—586. But 9 Pri. 573, Richards, C.B., dub.

(*o*) *Lady Cavan* v. *Pulteney*, 2 Ves. jun. 544, 3 Ves. 384.

(*p*) 2 Ves. jun. 555.

(*q*) *Wilson* v. *Wilson*, 1 De G. & S. 152. And see *Howells* v. *Jenkins*, 2 J. & H. 706; *Grissell* v. *Swinhoe*, L. R. 7 Eq. 291. But see *per* Lord Moncrieff, L. R. 7 H. L. 79.

(*r*) *Cooper* v. *Cooper* L. R. 6 Ch. 15; 7 H. L. 53. In that case a person who, if he had survived the testatrix, would have been put to his election, died intestate in her lifetime, leaving children, who were his next-of-kin; it was held that they were bound to elect, an allowance being made for the debts of the deceased: *Re Williams*, 110 L. T. 569.

(*s*) *Cooper* v. *Cooper*, L. R. 7 H. L. 53.

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belongs to several, as tenant for life and remainderman, each has a separate right of election (*t*). And if the person on whom the obligation to elect is cast dies without having elected, and his property devolves on several persons, each of them has a separate right of election (*u*). If A, the person who is bound to elect, elects to take against the will but dies before B, the disappointed legatee or devisee, asserts his rights, A's estate is liable to make compensation to B to the extent of the benefits which A was entitled to receive under the will (*x*). In *Pickersgill* v. *Rodger* (*y*), a testatrix bequeathed a sum of £15,000 (which really belonged to her four children, W., J., R., and H. in equal shares, subject to the testatrix's life estate) to R. and H. in equal shares, and devised her real estate to J., subject to the payment thereout of a sum of £10,000 to W. The son J. died before his mother, having by his will given his real estate to one person and his personal estate to others; he left issue, so that the devise to him of the real estate under the original testatrix's will did not lapse: it was held by Jessel, M.R., that the disappointed legatees under that will were entitled to compensation out of the real estate devised to J., but that no case of election arose against his residuary legatees.

Pickersgill v. *Rodger.*

In *Re Macartney* (*z*), a testator gave a sum of Colonial stock to M., and his shares in company A to several persons in varying proportions. He held practically all the shares in company A which in turn owned 90 per cent. of the shares in company B. In fact the testator held the Colonial stock in trust for company B so that the gift to M. failed. But it was held that the legatees of the shares in company A could not take without compensating M. and that such compensation was a charge on their legacies.

Where several are disappointed, the sequestered property is divided among them in proportion to the value of the interest of which they are disappointed (*a*).

When compensation is ascertained.

In all cases of election, the amount of compensation is ascertained as at the date of the testator's death (*b*).

Where property belongs to a class and

The practical working of the rule as to compensation in cases of election is exemplified in *Re Booth* (*c*). In that case a testator was absolutely entitled to certain lands, and was also

(*t*) *Ward* v. *Baugh*, 4 Ves. 623.

(*u*) *Fytche* v. *Fytche*, 19 L. T. 343. The report of this case in L. R. 7 Eq. 494, is so incomplete as to be almost worthless. See also *Harris* v. *Watkins*, 2 K. & J. 473.

(*x*) *Rogers* v. *Jones*, 3 Ch. D. 688; 7 Ch. D. 345; *Re Carpenter*, 51 L. T. 773.

(*y*) 5 Ch. D. 163; *Re Macartney*, [1918] 1 Ch. 300.

(*z*) [1918] 1 Ch. 300; distinguishing *Wollaston* v. *King*, L. R. Eq. 165.

(*a*) *Howells* v. *Jenkins*, 1 D. J. & S. 617.

(*b*) *Re Hancock*, [1905] 1 Ch. 16.

(*c*) [1906] 2 Ch. 321.

testator purports to give it to some members of the class and to strangers.

tenant for life of other lands, without any power of disposition over them, the persons entitled to them subject to his life interest being such of his children as attained twenty-one. By his will he devised his own lands and the settled lands to some of his children and to other persons in various shares, the shares of the children under the will not corresponding to their shares under the settlement. Consequently the interests of three classes of persons had to be considered, namely (A) persons entitled under the settlement to whom the testator gave part of his own property and also purported to give shares in the settled property; (B) persons entitled under the settlement, to whom the testator gave no part of his own property, but purported to give shares in the settled property; and (C) persons not entitled under the settlement, to whom the testator purported to give shares in the settled property. All the persons comprised in classes (A) and (B) elected to take against the will, the result being that some of them were deprived of the shares in the settled property purported to be given them by the will. It was held (first) that the members of class (A) were entitled to compensation *inter se*, so that every member of class (A) was bound to make compensation not only to class (C) but also to every other member of class (A); and (secondly) that all compensation received by any member of class (A) formed part of the benefits received by him under the will.

Compensation of parties *inter se*.

Where property does not belong either to testator or to legatee.

If the property which the testator professes to dispose of does not belong to the legatee, no case of election arises. In *Re Lord Chesham* (*d*), certain heirlooms were settled by deed upon trusts under which they were to go with the possession of a house of which the testator was tenant for life, with remainder to A as tenant for life; the testator bequeathed these heirlooms upon trust for sale for the benefit of B and C, and gave his residue to A. It was held by Chitty, J., that no case of election arose, because A could not give up the heirlooms. The learned Judge distinguished the case before him from the case of *Williams* v. *Mayne* (*e*), in which a testator bequeathed a legacy to a married woman, and purported to dispose of a fund in which she had a reversionary interest under her marriage settlement, and it was held that the legacy must be impounded until the reversionary interest fell into possession. *Williams* v. *Mayne* seems to have been decided in accordance with the views held by the Court of Appeal in *Robinson* v. *Wheelwright* (*f*).

(*d*) 31 Ch. D. 466. Compare the cases where a married woman is restrained from anticipation, *post*, pp. 526, 527.
(*e*) Ir. R. 1 Eq. 519.
(*f*) 6 D. M. & G. 535, disapproving *Wall* v. *Wall*, 15 Sim. 513.

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Foreign land.

So a person who cannot by any lawful act on his part give effect to the instrument under which the case of election arises, is not thereby disabled from taking a benefit under it (*g*).

Doctrine applies to contingent and reversionary interests.

The doctrine of election clearly applies as well to contingent as to vested rights (*h*); and to reversionary and remote as well as to immediate interests (*i*). "Lord Hardwicke, indeed," as Mr. Jarman points out (*k*), "at one time seems to have thought that it did not extend to a remainder expectant on an estate tail (*l*); but the notion stands upon no intelligible principle, and is inconsistent with his Lordship's own decision in *Graves* v. *Forman* (*m*), in which he would not allow an heir-at-law to whom an estate for life in remainder after an estate tail was devised, to take it without giving up a copyhold disposed of to another, but upon which the will could not (in the then state of the law) operate, for want of a previous surrender. The heir it seems (strangely enough) elected to take the estate for life in remainder, and eventually got nothing; the tenant in tail having acquired the fee-simple by suffering a common recovery."

Immaterial whether testator is acquainted with his want of title.

Mr. Jarman continues (*n*): "It is immaterial in regard to the doctrine of election, whether the testator, in disposing of that which is not his own, is aware of his want of title, or proceeds on the erroneous supposition that he is exercising a power of disposition which belongs to him; in either case, whoever claims in opposition to the will, must relinquish what the will gives him (*o*). This seems to result from the impossibility of knowing with certainty that the testator would not have made the disposition, had he been accurately acquainted with the title; and (as a great Judge has observed), 'nothing can be more dangerous than to speculate upon what he would have done, if he had known one thing or another' (*p*).

Principle of doctrine is compensation, not forfeiture.

"A question which has been much discussed is, whether the principle governing cases of election under a will is forfeiture or compensation; or, to speak more explicitly, whether a person claiming against a will is bound to relinquish the benefit thereby

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(*g*) *Brown* v. *Gregson*, [1920] A. C. 860 (land in the Argentine which could not be made subject to trusts).

(*h*) *Per* Lord Loughborough, 2 Ves. jun. 696, 697.

(*i*) *Webb* v. *Earl of Shaftesbury*, 7 Ves. 480; *Wilson* v. *Lord John Townshend*, 2 Ves. jun. 697.

(*k*) First edition, p. 386.

(*l*) *Bor* v. *Bor*, 3 Br. P. C. Toml. 178, n.

(*m*) Cited 3 Ves. 67; see *Mahon* v. *Morgan*, 6 Ir. Jur. 173.

(*n*) First edition, p. 387.

(*o*) *Whistler* v. *Webster*, 2 Ves. jun. 370; *Thellusson* v. *Woodford*, 13 *ib.* 221; *Welby* v. *Welby*, 2 V. & B. 199, overruling *Cull* v. *Showell*, Amb. 727, unless decided on the ground of the great lapse of time, which seems probable. *Re Brooksbank*, 34 Ch. D. 160.

(*p*) See Sir R. P. Arden's judgment in *Whistler* v. *Webster*, 2 Ves. jun. 370.

given to him *in toto*, or only to the extent of indemnifying the persons disappointed by his election. The strong current of the authorities, particularly those of a recent date, is in favour of the principle of compensation (*q*); interrupted, certainly, by some *dicta* (*r*), which seem to favour the doctrine of forfeiture (*s*). In the case of *Green* v. *Green* (*t*), Lord Eldon is generally supposed to have used expressions indicating a similar opinion. His Lordship, however, expressly admits the cases to have decided that the party electing against a *will* was not bound to give up more than was enough to make satisfaction for that which was intended for another; and when his Lordship states the contrary doctrine, it is with reference to the case before him, which arose upon a *deed*, 'in which,' he observed, 'as it is a contract, it is very difficult to say that compensation only is to be made' (*u*). The doctrine of compensation was also subsequently recognised by the same high authority in the House of Lords, in *Ker* v. *Wauchope* (*x*), as well as in the earlier and much-discussed case of *Lord Rancliffe* v. *Parkyns* (*y*); and were it not that the contrary doctrine has received the support of a gentleman of great ability and eminence (*z*), the writer would not have thought the point open to discussion." It is now generally accepted as the settled doctrine of the Court (*a*).

No compensation where legatee takes under will.

If the person who is put to his election elects to take under the will, no question of compensation arises (*b*).

Personal competency to express intention requisite.

Mr. Jarman continues (*c*): "In order to raise a case of election, there must be a *personal* competency on the part of the

(*q*) *Webster* v. *Mitford*, 2 Eq. Ca. Ab. 363, stated from Reg. Lib. 1 Sw. 449; *Bor* v. *Bor*, 3 Br. P. C. Toml. 167; *Ardesoife* v. *Bennet*, 2 Dick. 463; *Lewis* v. *King*, 2 Br. C. C. 600; *Freke* v. *Lord Barrington*, 3 Br. C. C. 284; *Blake* v. *Bunbury*, 1 Ves. jun. 523; *Whistler* v. *Webster*, 2 Ves. jun. 372; *Lady Cavan* v. *Pulteney*, 2 Ves. jun. 560; *Ward* v. *Baugh*, 4 Ves. 627; *Dashwood* v. *Peyton*, 18 Ves. 49; *Welby* v. *Welby*, 2 V. & B. 190. (See these cases stated in Mr. Swanston's note to *Gretton* v. *Haward*, 1 Sw. 433); *Tibbits* v. *Tibbits*, Jac. 317.

(*r*) *Cowper* v. *Scott*, 3 P. W. 119; *Cookes* v. *Hellier*, 1 Ves. sen. 234; *Morris* v. *Burroughs*, 1 Atk. 404; *Villareal* v. *Lord Galway*, 1 Br. C. C. 292, n.; *Wilson* v. *Townshend*, 2 Ves. jun. 697; *Wilson* v. *Mount*, 3 Ves. 194; *Broome* v. *Monck*, 10 Ves. 609; *Thellusson* v. *Woodford*, 13 Ves. 220.

(*s*) And by an express decision of Lord Langdale to that effect: *Greenwood* v. *Penny*, 12 Bea. 406.

(*t*) 2 Mer. 86.

(*u*) 19 Ves. 668.

(*x*) 1 Bli. 1.

(*y*) 6 Dow. 149.

(*z*) 1 Roper's Husband and Wife, by Jacob, 556, n.; "The writer understands that other eminent equity lawyers concur in Mr. Jacob's views." (Note by Mr. Jarman.) See also Sug. Pow. p. 575 (8th ed.), where the doctrine of forfeiture is preferred.

(*a*) *Schroder* v. *Schroder*, Kay 578; *Howells* v. *Jenkins*, 1 D. J. & S. 617; *Cooper* v. *Cooper*, L. R. 6 Ch. 15, 7 H. L. 53; *Re Vardon's Trusts*, 28 Ch. D. 124; 31 Ch. D. 275. Compare *Griffith Boscawen* v. *Scott*, 26 Ch. D. 358.

(*b*) *Re Lord Chesham*, 31 Ch. D. 466, and cases there cited.

(*c*) First edition, p. 388.

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author of the attempted disposition, as the doctrine is founded on intention (*d*), which supposes such competency. Thus, under the old law, where personalty was, and real estate was not, disposable by the will of a person under age, the heir of the infant testator was allowed to take his real estate in opposition to the will, without relinquishing a legacy bequeathed to him by the same will (*e*). And though the disability of coverture is, in some respects, distinguishable from and less absolute than that of infancy (a *feme covert* having, it is said, a disposing mind, but not a disposing power, while an infant has neither the one nor the other), yet the principle seems, according to the authorities, to apply to the attempted dispositions of married women. If therefore, a *feme covert*, having a testamentary power, makes an appointment by will in favour of her husband, and by the same will professes to bequeath to another personal estate to which her power does not extend, the husband may take the benefit appointed to him, and also defeat the intended bequest of the other property, by the assertion of his marital right " (*f*).

As to infants and *femes covertes*.

So if a married woman, subject to the old law, makes a valid testamentary disposition in favour of her heir, and attempts to devise real estate, not settled to her separate use, to a stranger, the heir is not put to his election (*g*). Or if she makes a valid appointment of personalty in favour of her next-of-kin, and an invalid appointment of another fund to strangers, the next-of-kin are not put to their election (*h*).

But if a married woman attempts to dispose by will of property which belongs to her husband otherwise than *jure mariti*, and makes a valid disposition of other property in his favour, he is bound to elect (*i*).

Effect of Married Women's Property Acts.

In *Rich* v. *Cockell* (*k*) (cited by Mr. Jarman, *supra*) the will was wholly inoperative, except as to the testatrix's separate estate; it had not been proved, and could not be proved without the husband's assent. Since the Married Women's Property Acts, the will of a married woman is entitled to probate (*ante*, p. 48), and it is submitted that this alteration in the law has rendered obsolete the doctrine stated above by Mr. Jarman. *Re*

(*d*) That is, a disposing intention, not an intention to put the owner to his election: see *per* Lord Cairns, *Cooper* v. *Cooper*, L. R. 7 H. L. 67.

(*e*) *Hearle* v. *Greenbank*, 1 Ves. sen. 298. See *Re Anderson*, [1905] 2 Ch. 70.

(*f*) *Rich* v. *Cockell*, 9 Ves. 370. The passage above quoted was referred to by Kay, J., in *Re De Burgh Lawson*, 55 L. J. Ch. 46, as a correct statement of the law. *Re Coole*, [1920] 2 Ch. 536 (attempted devise by woman married before 1883).

(*g*) *Re De Burgh Lawson*, 55 L. J. Ch. 46.

(*h*) *Blaiklock* v. *Grindle*, L. R. 7 Eq. 215.

(*i*) *Coutts* v. *Acworth*, L. R. 9 Eq. 519.

(*k*) 9 Ves. 370.

Harris (*l*) seems to have been partly decided on this ground. In that case a testatrix gave her husband an annuity of £100, and bequeathed to C. a gold watch which had formerly belonged to her, but became her husband's property, *jure mariti*, on her marriage in 1873 : it was held by Parker, J., that the husband was put to his election.

Foreign will.

Where by a foreign will, not so executed as to pass real estate in England, real estate in England is devised away from the heir and personal estate is bequeathed to the heir, the heir is not bound to elect between the real and personal estate, but takes both (*m*).

In what cases a Scottish heir is put to election by English will.

Nearly allied to the cases before the Wills Act, where a will might pass personalty and not be executed so as to pass realty (*n*), are those where a testator entitled to heritable property in Scotland, affects by will in the English form, ineffectual to pass the Scottish property, to devise it away from the Scottish heir, at the same time giving him property in England. It seems now well settled that in such cases, if the English will purports to give the Scottish property either by name or under the general denomination of property in Scotland (*o*), or of property "in any part of the United Kingdom" (*p*), the Scottish heir is put to his election, while, on the other hand, a devise in general terms of all the testator's property whatsoever and wheresoever is held to refer only to such property as he has power to give by the will, and the Scottish heir may claim both by descent and under the will (*q*); the first proposition also seems to apply where the disposition is in the Scottish form, but not sufficient to pass lands in England away from the English heir (*r*), and it is presumed the latter proposition would be held to apply also, as the doctrine of approbate and reprobate in Scotland, and of election in England, seem to be identical (*s*).

(*l*) [1909] 2 Ch. 206. In his judgment Parker, J., seems to doubt whether Mr. Jarman's statement of the law was justified, even in 1844, by the decision in *Rich* v. *Cockell*.

(*m*) *Re De Virte*, [1915] 1 Ch. 920; *Hearle* v. *Greenbank*, 3 Atk. 695, 715.

(*n*) These cases are omitted in the present edition.

(*o*) *Brodie* v. *Barry*, 2 V. & B. 127; *Reynolds* v. *Torin*, 1 Russ. 129; *M'Call* v. *M'Call*, Dru. t. Sug. 283.

(*p*) *Orrell* v. *Orrell*, L. R. 6 Ch. 302.

(*q*) *Johnson* v. *Telford*, 1 R. & My. 244; *Allen* v. *Anderson*, 5 Hare, 163; *Maxwell* v. *Maxwell*, 16 Bea. 106, 2 D. M. & G. 705; *Maxwell* v. *Hyslop*, L. R. 4 Eq. 407. As to land in France, see *Baring* v. *Ashburton*, 54 L. T. 463.

(*r*) *Dundas* v. *Dundas*, 2 Dr. & Cl. 349. The Scottish Courts, therefore, unlike the English Courts, will read against the English heir an instrument imperfectly executed according to the Statute of Frauds, so as to put him to an election; and in like manner the English Courts (treating the Scottish heir differently from the English heir, *Dewar* v. *Maitland*, L. R. 2 Eq. 834) will read against the Scottish heir an instrument insufficient according to the law of Scotland to disinherit him.

(*s*) 2 D. & Cl. 352; 16 Bea. 107; *Ker* v. *Wauchope*, 1 Bli. 1; *Codrington*

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Two wills.

In *Douglas-Menzies* v. *Umphelby* (*t*), a testator domiciled in Scotland made two wills, under each of which he gave benefits to his wife; one will was to take effect according to the law of New South Wales, the other according to the law of Scotland; the wife took proceedings in Scotland in which she successfully asserted a claim to share in the testator's property contrary to the terms of the will, and it was held that under the doctrine of approbate and reprobate she could not take any benefit under the Australian will.

Land in Turkey.

In *Haynes* v. *Foster* (*u*), a testator devised land in Turkey, which by the law of that country he had no power to dispose of by will, and it was held that his son, being one of his heirs by Turkish law, was put to his election.

Land in Paraguay.

So in *Re Ogilvie* (*x*), the testatrix domiciled in England disposed of realty in Paraguay upon trust for charity. This was bad by Paraguayan law as to four-fifths which went to the obligatory heirs to whom the testatrix bequeathed benefits out of property in England. The heirs were put to their election.

Powers of appointment.

The application of the doctrine of election to appointments under power is discussed elsewhere (*y*).

Not applicable to creditors.

The doctrine of election has been held not to apply to creditors; and, therefore, where a testator appropriated to the payment of debts property which was not liable thereto, and by the same will disposed of, in favour of other persons, property which was by law assets for the payment of debts, it was held that the creditors might take the latter in subversion of the testator's devise, without abandoning their claim to the former (*z*). And where a testator devised for payment of debts certain lands (including some which were not his own, but belonged to his son) the son was allowed to participate as a creditor in the provision for debts, out of the other property, without relinquishing his own estate to the creditors (*a*). But now real estates of every description are assets for the payment of debts (*b*).

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v. *Codrington*, L. R. 7 H. L., at p. 866; *Pitman* v. *Ewing*, [1911] A. C. 217.

(*t*) [1908] A. C. 224.

(*u*) [1901] 1 Ch. 361.

(*x*) [1918] 1 Ch. 492.

(*y*) Chap. XXIII.

(*z*) *Kidney* v. *Coussmaker*, 12 Ves. 136; see also *Clark* v. *Guise*, 2 Ves. 617.

(*a*) *Deg* v. *Deg*, 2 P. W. 412. See further as to the position of creditors with reference to the doctrine of election, *per* Lord Cairns in *Cooper* v. *Cooper*, L. R. 7 H. L. p. 66.

(*b*) *Post*, pp. 1940, 1975.

Whether parol evidence is admissible.

II.—Parol Evidence inadmissible to raise Election.—"At one period," says Mr. Jarman (*c*), "it was doubted whether evidence *dehors* the instrument was admissible for the purpose of showing that a testator considered that to be his own which did not actually belong to him, or was not under his disposing power. In the well-known case of *Pulteney* v. *Darlington* (*d*), rent-rolls and steward's accounts were admitted to prove that the testator dealt as absolute owner with lands of which he was only tenant in tail, and, consequently, that he must have intended them to pass under a general devise of his real estate, so as to impose election on the heir in tail, to whom, by the same will, a benefit was given, though the testator had a large estate of his own, to which the words were applicable (*e*).

"Lord Commissioner Eyre, however, in *Blake* v. *Bunbury* (*f*), laid it down, that 'the intent of the testator to dispose of that which was not his, ought to appear on the will.' The admissibility of extrinsic evidence, too, was strongly denied by Lord Loughborough, in *Stratton* v. *Best* (*g*); and the same Judge expressed his disapprobation of *Pulteney* v. *Lord Darlington*, in *Rutter* v. *Maclean* (*h*); as did Lord Eldon in *Pole* v. *Lord Somers* (*i*), *and Druce* v. *Dennison* (*k*). In the latter case, however, his Lordship admitted a statement of property written by the testator, and books of account, as evidence that he considered himself to be owner, and, as such, intended to dispose of certain messuages and leases, the property of his wife, part of which the testator had made his own by alienation; but Lord Eldon seems to have regarded the papers themselves as testamentary, and to have thought that he must either admit the testator's explanatory statement as extrinsic evidence, or give the parties an opportunity of propounding it as part of the will in the Ecclesiastical Court. This case, however, does not contain so decided an expression of his Lordship's opinion on the subject, as we find in a subsequent case in the House of Lords (*l*) in which he observed that he thought the rules as to election had been settled: 'It must appear on the face of the will, that the testator proposes that there should be an election, and as

(*c*) First edition, p. 391.

(*d*) (*Lady Cavan* v. *Pulteney*; *Darlington* v. *Pulteney*); 2 Ves. jun. 544, and 3 Ves. 384.

(*e*) See also *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. 516; *Rutter* v. *Maclean*, 4 Ves. 531; *Pole* v. *Lord Somers*, 6 Ves. 309; and *Druce* v. *Denison*, *ib.* 385; and see *Finch* v. *Finch*, 4 Br. C. C. 38; 1 Ves. jun. 534.

(*f*) 1 Ves. jun. 523.

(*g*) 1 Ves. jun. 285.

(*h*) 4 Ves. 537.

(*i*) 6 Ves. 322.

(*k*) *Ib.* 402

(*l*) *Doe* v. *Chichester*, 4 Dow, 76, 89, 90.

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to what subjects.' And his Lordship referred to *Druce* v. *Dennison* as standing, to some extent at least, on the special ground which has been noticed. Lord Eldon also adverted to a case of *Andrews* v. *Lemon*, where a testator bequeathed all his personal property (he having personal property of his own, and also personal property not so strictly his own, but which he had power to dispose of by deed or will), for purposes for which his own was insufficient; Sir L. Kenyon, M.R., sent it to the Master to inquire whether by personal property he meant his own strictly, or intended to include both : but when the evidence was taken, he was so much struck with his own decision, that he said, 'Though the evidence has been taken, I shall not now admit one word of it, it being necessary, for the general interests of mankind, that persons should in their wills state clearly what they mean.'

Parol evidence rejected.

"The doctrine thus earnestly advocated by these eminent Judges has prevailed in subsequent cases. As in *Clementson* v. *Gandy* (*m*), where parol evidence was tendered for the purpose of showing that the testatrix had supposed herself to be absolute owner of, and intended to include in the residuary bequests in her will, certain settled property, in which she had only a life interest, in order to raise a case of election against a legatee under the will, who also took an interest in such property under the settlement; but the evidence was rejected, Sir J. Leach, M.R. (*n*), observing that the intention to dispose must in all cases appear by the will itself; that there was no ambiguity in the expressions the testatrix had employed and extrinsic evidence for the purpose of contradicting the intention was inadmissible." (*o*).

Expressions must be clear in order to raise a case of election.

III.—What Dispositions are sufficient to raise Election.—With respect to the intention, as manifested by the will itself, it is to be observed, that, in order to raise a case of election, it must be clear and decisive; for if the testator's expressions will admit of being restricted to property belonging to or disposable by him, the inference will be that he did not mean them to apply to that over which he had no disposing power (*p*). Thus,

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(*m*) 1 Kee. 309; see also *Dixon* v. *Samson*, 2 Y. & C. 566. The exploded doctrine of *Darlington* v. *Pulteney* was treated *obiter* as law by Jessel, M.R., in *Pickersgill* v. *Rodger*, 5 Ch. D. 171; but the subsequent cases were not cited.

(*n*) The Judge was Lord Langdale.

(*o*) *Re Harris*, [1909] 2 Ch. 206, at p. 209; *Galvin* v. *Devereux*, [1903] 1 Ir. R. 185.

(*p*) See *Dashwood* v. *Peyton*, 18 Ves. 41; *Rancliffe* v. *Parkyns*, 6 Dow, 149; *Minchin* v. *Gabbett*, [1926] 1 Ir. R. 1, and the other cases cited *post*, p. 524.

in *Dummer* v. *Pitcher* (*q*), where the testator having, before making his will, transferred certain 4 per cent. and 5 per cent. stock (then forming the whole of his funded property) into the joint names of himself and his wife, bequeathed the rents of his leasehold houses, and the interest of all his funded property or estate, of whatsoever kind, to trustees, upon trust for his wife for life, and after her decease upon trust to pay divers legacies of 4 per cent. stock, the aggregate amount of which fell short by £50 only of the amount of stock of that description so formerly transferred by him : he afterwards made some further purchases of 5 per cent. stock, taking the transfers in the joint names of himself and his wife. The testator at his death left no funded property, except the 4 per cents. and 5 per cents. before mentioned, exclusive of which his assets were greatly inadequate to pay his legacies. It was held, first, that all the sums of stock then standing in the joint names of the husband and wife, and whether transferred before or after the date of his will, became, by survivorship, the absolute property of the wife; secondly, that the will did not purport to dispose of the stock in terms sufficiently distinct and explicit to put the wife to her election (*r*).

But if the will is so expressed as to show that the testator had in mind some specific property the case is different (*s*).

Re Sullivan.

In *Re Sullivan* (*t*) the testator gave a legacy to his wife to be paid to her either in cash or in such of his shares (including shares standing jointly in her name with his) as she might select, and gave the income of his residue to his wife for life. The widow was put to her election between the benefits under the will and her claim to the stocks and shares standing in the joint names.

General devise restricted to property of testator.

A general devise of the testator's real estate has always been held to show an intention to give what strictly and properly belonged to him, and nothing more, even if the testator had no real estate of his own upon which the devise could operate. The same principle was held, in *Timewell* v. *Perkins* (*x*), to apply to a devise of a specified kind of property, as "ground-rents"; in

(*q*) 5 Sim. 35; 2 My. & K. 262; see also *Crabb* v. *Crabb*, 1 My. & K. 511; *Blommart* v. *Player*, 2 S. & St. 597; *Parker* v. *Carter*, 4 Hare, 411; *Smith* v. *Lyne*, 2 Y. & C. C. C. 345; *Seaman* v. *Woods*, 24 Bea. 381; *Jervoise* v. *Jervoise*, 17 Bea. 566. In *Re Sullivan*, [1917] 1 Ir. R. 38, *supra*, the widow was put to her election.

(*r*) See also *Henry* v. *Henry*, Ir. R. 6 Eq. 286; *Minchin* v. *Gabbett*, [1896] 1 Ir. R. 1.

(*s*) *Att.-Gen.* v. *Fletcher*, 5 L. J. (N.S.) Ch. 75; *Shuttleworth* v. *Greaves*, 4 My. & Cr. 38; *Coates* v. *Stevens*, 1 Y. & C. 66; *Grosvenor* v. *Durston*, 25 Bea. 97; *Re Harris*, [1909] 2 Ch. 206. In *Poole* v. *Odling*, 31 L. J. Ch. 439, a bequest of £800 consols was held to be general, and therefore not to refer to a like sum standing in the name of the testator and his wife.

(*t*) [1917] 1 Ir. R. 38.

(*x*) 2 Atk. 102.

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Devise of "ground-rents."

regard to which however, it is to be observed, that the bequest, even under the law before the Wills Act, would have included, and, therefore, might have been designed to include, leasehold ground-rents purchased by the testator after the making of the will; so that no inference that he had not his own property in contemplation arose from the circumstance of his not having any such when he made his will.

General clause of revocation.

On the same principle, a clause in general terms revoking all settlements theretofore made by the testator, is not sufficient evidence of an intention to put the beneficiaries to their election (*y*).

Devise of lands in a certain locality.

With regard to wills devising lands in a particular locality, it is difficult to say that no inference that the testator had some specific property in view arises from the fact of his having none of his own to satisfy the devise at the date of its execution; for it is a whimsical intention to impute to a testator, when he affects to dispose of all property of a particular character, of which he has now, or may hereafter have power to dispose, that he makes that disposition without the least suspicion that he has then any property of that description, and solely with the notion that he may thereafter buy some such property (*z*). Where the devise is specific in the sense of being a gift of a particular estate, as "my R. property," the wife alone and not the devisor being entitled to that property, she must undoubtedly elect (*a*). And where (*b*) a testator was seised of freeholds in fee simple and of copyholds in tail, and himself occupied parts of each, and had let other parts of each to tenants at entire rents, and then by will, dated in 1859, devised his "real estate" upon trust as to the "lands occupied by him" for his wife, and confirmed his tenants "in their present occupations at their present rents" for twenty-one years, it was held that the heir in tail of the copyholds (to whom an annuity was bequeathed) must elect.

Question whether testator intends to include interest of co-proprietor.

IV.—Where the Testator has only a Partial Interest.—But the most numerous as well as the most difficult class of cases with which the Courts have had to deal, consists of those in which the testator and the person against whom the election is sought to be raised, have each an undivided share, or some partial or limited interest, in the property; and in which, therefore, the question is not, as in the cases before discussed, simply whether the testator referred to particular tenements, but whether he intended the devise to comprise such property,

(*y*) *Re Booker*, 34 W. R. 346.
(*z*) *Per* Wood, V.-C., *Usticke* v. *Peters*, 4 K. & J. 455.
(*a*) *Whitley* v. *Whitley*, 31 Bea. 173.
(*b*) *Honywood* v. *Forster*, 30 Bea. 14.

Padbury v. *Clark.*

inclusive of the interest of his co-owner. Thus, in *Padbury* v. *Clark* (*c*), the testator being entitled to a moiety of a freehold house, devised "all that my freehold messuage, etc., now on lease to A and in his occupation, giving the person entitled to the remaining moiety benefits under his will; he was also entitled to a moiety of some other property, which he devised by the description of "all that my moiety," etc. Lord Cottenham observed that he found no ground for a doubt as to the intention to give the entirety; that the words were ample, complete and correct for that purpose, but wholly inapplicable to the supposed gift of a moiety only: and that if this were matter of any doubt, this construction would be strongly corroborated by the other devise, which showed how the testator described a moiety when his intention was to give only a moiety. The L.C. therefore held that the owner of the other moiety must elect. A direction to repair the specifically described property would likewise corroborate this construction (*d*); but it would appear from Lord Cottenham's judgment, and from subsequent authorities (*e*), that a specific devise as of the entire subject will generally suffice, without such assistance, to put the co-owner to his election.

Swan v. *Holmes.*

So, in *Swan* v. *Holmes* (*f*), where a sum of £10,000 consols stood settled in trust for two sisters for life, and after their deaths, two-thirds of the capital in trust for their brother, and one-third in trust for their sisters; and the brother bequeathed the whole of his property to trustees, as to part on certain trusts for his sisters; and he afterwards bequeathed the property, "including the £10,000 trust money," to other persons: it was held that the sisters must elect between the benefits given them by the will, and their interest in the £10,000 consols.

Question, whether testator, having reversion only, intends to include the immediate interest.

Where the testator has a reversion only in the lands devised, it frequently becomes a question whether he intended to confine the will to that estate, or to include in it the immediate and absolute interest. *Prima facie*, the testator must, of course, be understood to refer only to what he had power to dispose of. But the context of the will must be examined, to see whether an intention to include also what he had no such power to dispose of, be indicated; and for this purpose, notwithstanding some strong expressions tending to show the difficulty

(*c*) 2 Mac. & G. 298.

(*d*) *Howells* v. *Jenkins*, 2 J. & H. 706. There was no such direction in *Padbury* v. *Clark*.

(*e*) *Wilkinson* v. *Dent*, L. R. 6 Ch. 339; *Fitzsimons* v. *Fitzsimons*, 28 Bea. 417; *Miller* v. *Thurgood*, 33 Bea. 496.

(*f*) 19 Bea. 471.

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of applying the doctrine of election to such cases (*g*), the ordinary rules for collecting the testator's intention must be observed, the question being simply, what does the testator mean? If he has subjected the lands in question to limitations which, if the devise be limited to the reversion, cannot, or probably will not, ever take effect, or has conferred powers on the devisees which, on the same hypothesis, they can never exercise, the intention to include the immediate interest will be sufficiently established (*h*). But these indications of intention will not prevail against an express and unreserved confirmation of the settlement creating the estates which precede the testator's reversion. Express declaration overrides conjecture, however probable (*i*).

On the same principle, if a testatrix devises "all my estate and interest to the lands of H," in which she has only a life interest, this does not put the remainder-man to his election (*k*). And if a testator has a charge on land at L. and no other property there, and disposes of all his property at L., he has a sufficient interest to satisfy the words of the will (*l*).

Similar question where testator is entitled subject to incumbrances.

Again, if a testator, having an estate subject to an incumbrance, simply devises the estate without saying more, he is to be taken to mean the estate in its actual condition; and the incumbrancer, to whom other benefits are given by the will, is not, in such a case, put to his election; still less, if the beneficiary be entitled only to participate in the incumbrances with others to whom no benefit is given by the will (*m*). But the provisions of the will may show an intention that the incumbrancer shall give up his charge (*n*).

Dowress when put to her election.

V.—Claims by Widow of Testator.—A similar question, and one which was formerly much agitated, was (*o*) whether the widow of a testator, married before 1834, was precluded, by a

(*g*) See *per* Lord Eldon, in *Rancliffe* v. *Parkyns*, 6 Dow, 149; *Minchin* v. *Gabbett*, [1896] 1 Ir. R. 1.

(*h*) *Welby* v. *Welby*, 2 V. & B. 187; *Wintour* v. *Clifton*, 21 Bea. 447; 8 D. M. & G. 641; *Usticke* v. *Peters*, 4 K. & J. 437.

(*i*) *Rancliffe* v. *Parkyns*, 6 Dow, 149. But confirmation of a portion of the settlement leaves the remaining portion unconfirmed: *Blake* v. *Bunbury*, 1 Ves. jun. 514.

(*k*) *Galvin* v. *Devereux*, [1903] 1 Ir. R. 185, distinguishing *Whitley* v. *Whitley*, 31 Bea. 173.

(*l*) *Maddison* v. *Chapman*, 1 J. & H. 470.

(*m*) *Stephens* v. *Stephens*, 3 Drew. 697; 1 De G. & J. 62; *Sadlier* v. *Butler*, Ir. R. 1 Eq. 415; *Henry* v. *Henry*, *ib.* 286.

(*n*) *Blake* v. *Bunbury*, 1 Ves. jun. 514. See *Sadlier* v. *Butler*, *supra*, where the circumstances were very special.

(*o*) As this question can seldom be of any practical importance at the present time, the remarks of the learned writer and of former editors as to election by a dowress have been omitted. For a fuller discussion of the cases referred to on this subject, see the fourth edition of this work, Vol. I, pp. 458 *seq.*

benefit given to her by his will, from claiming dower out of lands devised by that will.

Widow, when excluded from share of personalty.

A gift to the widow in satisfaction of all her claims on the testator's estate, does not preclude her from claiming her share of the personalty under the Statutes of Distribution, in the event of the failure of a bequest of that property (*p*).

Distinction in case of personalty where widow is in terms excluded but part of the personalty is left undisposed of.

With regard to the widow's claim to her share of the personalty, it is said to be different if, on the face of the will, there is an original intestacy as to a part of the personal estate, on the ground that the exclusion cannot then be represented as auxiliary to any disposition of that portion of the personalty; it must have an independent effect; and the only effect it can possibly have is to exclude the widow from participation in the undisposed part of the personalty (*q*).

Provision excluding widow.

There appears to be a distinction between those cases in which a testator makes a gift to his widow in satisfaction of all her claims on the testator's estate, and those in which he expressly excludes her from taking any share or interest in his estate, for such a direction may, if clearly expressed, amount to a gift by implication to the other persons entitled under an intestacy. It appears that Shadwell, V.-C., decided the contrary in *Johnson* v. *Johnson* (*r*), but if so it is submitted that the decision is erroneous (*s*).

Gift in lieu of a specified thing does not exclude from another gift.

VI.—When Election is excluded.—The ordinary doctrine of election may, doubtless, be excluded either wholly or partially, if the testator so desires. "The rule in *Noys* v. *Mordaunt*," said Lord Hardwicke (*t*), "of not claiming by one part of a will in contradiction to another, is a true rule, but has its exceptions. . . . Several cases have been, and several more may be, in which a man shall give a child or other person a legacy or portion in lieu or satisfaction of particular things expressed, which shall not exclude him from another benefit, though it may happen to be contrary to the will; for the Court will not construe it as

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(*p*) *Pickering* v. *Lord Stamford*, 2 Ves. jun. 272, 581; 3 Ves. 332, 492; *Tavernor* v. *Grindley*, 32 L. T. 424; see also *Sympson* v. *Hutton*, 11 Vin. Ab. Executors, 185; 2 Eq. Ca. Ab. 439, but more correctly stated 3 Ves. 335; *Naismith* v. *Boyes*, [1899] A. C. 495. But a declaration to this effect in a settlement will, of course, effectually bar the widow: *Gurly* v. *Gurly*, 8 Cl. & Fin. 743; *Druce* v. *Denison*, 6 Ves. 395; the former case appears to overrule *Slatter* v. *Slatter*, 1 Y. & C. 28. See also *Coyne* v. *Duigan*, [1894] 1 Ir. R. 138.

(*q*) *Lett* v. *Randall*, 3 Sm. & G. 83: not appealed on this point: 2 D. F. & J. 388. The doctrine so laid down is probably bad law.

(*r*) 4 Bea. 318.

(*s*) The cases are discussed, *post*, Chap. XIX, p. 655.

(*t*) *East* v. *Cook*, 2 Ves. sen. 33. See also *Bor* v. *Bor*, 3 Br. P. C. Toml. 167.

meant in lieu of everything else, when he has said a particular thing."

The case put by Lord Hardwicke occurred in *Brown* v. *Parry* (*u*), where a testator gave his wife an annuity "to be accepted by her in lieu of her dower" and also bequeathed other benefits to her (without adding in lieu of her dower); the widow elected not to take the annuity, but to keep her dower; and it was held by Lord Thurlow that she was nevertheless entitled to take the rest of the testator's bounty, and that the case was too clear for argument. In truth, this is not properly a case of election at all; which arises only when something is taken against the will. There is here a legacy upon an express condition which is submitted to, and another legacy without express condition. Why should a condition be annexed by implication to the latter bequest, when by taking it the legatee disappoints no part of the will?

But if the words of the will are sufficiently wide, the legatee may be put to election (*x*).

And the case is different where a gift is made in lieu of a particular thing expressed, and there is then a question—not whether the legatee, while rejecting the proposed exchange, can take another gift under the will unconditionally, but—whether, while accepting the exchange, he can insist on his right to another property against the will. Thus, in *Wilkinson* v. *Dent* (*y*), where a testatrix gave to her brother T. £10,000 in satisfaction of any sums in which she then was or might at her death be indebted to him, and to her brother W. £3,000 in lieu and satisfaction of any rentcharge out of a certain part of her real estate, and specifically disposed of the entirety of another estate, in which both brothers had interests: it was held that the brothers taking their legacies must bring these latter interests into account as well as the debts and the rentcharge. Sir W. M. James, L.J., said, "The question is, whether there is testamentary bounty to a person whose estate and right are, under another part of the will, interfered with. It appears to me clear that this question must be answered in the affirmative, though before the amount of the bounty can be ascertained, the amount of the claims which the legatees had against the testatrix must be ascertained."

Wilkinson v. *Dent.*

Restraint on anticipation.

Where a testator attempts to dispose of property in favour of A, and gives his own property to B, a married woman, with a restraint on anticipation, this shows that he intends to exclude

(*u*) Romilly's No. Cas. 85, also reported, but imperfectly, 2 Dick. 685.
(*x*) *Nottley* v. *Palmer*, 2 Dr. 93.
(*y*) L. R. 6 Ch. 339.

the doctrine of election, so that if the property attempted to be given to A devolves on B, she is not bound to make compensation to A out of the property given to her by the testator's will. The doctrine of election does not apply, because the property, which if the doctrine applied would have to be sequestered, in order to compensate the disappointed legatee, has by the terms of the will itself been made inalienable (*z*). But where a testator gave a share of his residuary estate in trust for a spinster for life, coupled with a restraint on anticipation which was not in terms confined to coverture and disposed of other property which belonged to her, the spinster was put to her election (*a*). Where the restraint on anticipation, or inalienability, is created independently of the will, a different principle seems to apply (*b*).

Mistake.

In *Box* v. *Barrett* (*c*), a testator by his will recited that his two daughters, A and B, were entitled to certain property under a settlement, and stated that for this reason he had not given them so large a share of his own property as he would otherwise have done; he then devised to A and B certain estates, and to his two other daughters, C and D, other estates, of much greater value; in fact his four daughters were entitled under the settlement; it was held that this mistake did not put C and D to their election.

Infant.

VII.—Election by Persons under Disability.—An infant cannot elect, and in those cases in which an infant, if adult, would have to elect, the ordinary practice is to direct an inquiry whether it is to his advantage to take under or against the will (*d*). But in some cases the infant has been allowed to postpone his election until he comes of age (*e*).

Lunatic.

The Court has power, in certain cases, to elect on behalf of a person of unsound mind not so found by inquisition (*f*).

(*z*) *Re Wheatley*, 27 Ch. D. 606; *Re Vardon's Trusts*, 31 Ch. D. 275; *Haynes* v. *Foster*, [1901] 1 Ch. 361. *Smith* v. *Lucas*, 18 Ch. D. 531, and *Hamilton* v. *Hamilton*, [1892] 1 Ch. 396, were cases of settlement by deed.

(*a*) *Re Hargrove*, [1915] 1 Ch. 398, following *Re Tongue*, [1915] 1 Ch. 390, not following *Haynes* v. *Foster*, [1901] 1 Ch. 361. *Bolster* v. *Bolster*, [1916] 1 Ir. 57 (Settlement).

(*b*) *Ante*, p. 513 (*Re Lord Chesham*).

(*c*) L. R. 3 Eq. 244, where *Dashwood* v. *Peyton*, 18 Ves. 27, and *Langslow* v. *Langslow*, 21 Bea. 552, were cited. See also *Lewis* v. *Lewis*, Ir. R. 11 Eq. 340.

(*d*) *Gretton* v. *Haward*, 1 Sw. 413 and note; *Brown* v. *Brown*, L. R. 2 Eq. 481; *Re Montagu*, [1896] 1 Ch. 549; *Re Barnett*, [1900] W. N. 81; *Cooper* v. *Cooper*, L. R. 7 H. L. 53. As to the practice where the infant is tenant in tail, see *Re Montagu*, [1896] 1 Ch. 549.

(*e*) *Boughton* v. *Boughton*, 2 Ves. sen. 12; *Streatfield* v. *Streatfield*, Ca. t. Talb. 176.

(*f*) *Re Marriott*, 2 Moll. 516; *Wilder* v. *Pigott*, 22 Ch. D. 263. The question in that case was as to the confirmation of a settlement made during infancy, but the principle seems to be the same. See *Re Earl of Sefton*, [1898] 2 Ch. 378.

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Married woman.

On the question whether a married woman subject to the old law can elect, the authorities are not consistent, but the weight of authority seems to be against her having capacity to do so (*g*). It was decided in *Ardesoife* v. *Bennet* (*h*), that a married woman could elect to take under a will; and the same principle seems to be laid down in *Griggs* v. *Gibson* (*i*). But the *dicta* in *Wilson* v. *Townshend* (*k*) and *Davis* v. *Page* (*l*) lead to a contrary conclusion, and in *Cooper* v. *Cooper* (*m*), where it was decided that two persons (one of whom was a married woman) were put to their election, it was also held that the married woman could not herself elect, and that the Court must ascertain by inquiry whether it was for her benefit to take under or against the will. It is possible that the decision in *Ardesoife* v. *Bennet* may be explained on the principle that as it was obviously to the benefit of the married woman to elect in a particular way, the Court would (if she had been living) have elected for her without an inquiry (*n*), and she being dead, the Court treated her, retrospectively, as having so elected.

Separate estate.

It seems clear on principle, though the point has not been decided, that a married woman can elect in respect of her separate estate (*o*).

VIII.—Time and Mode of Election.—It seems that a person does not lose his right to elect by mere lapse of time, unless it can be shown that injury would result to third persons by the delay (*p*).

(*g*) As to the position of a married woman in this respect, see *Nicholl* v. *Jones*, L. R. 3 Eq. 696; *Cahill* v. *Cahill*, 8 A. C. 420.

(*h*) 2 Dick. 463; see *Barrow* v. *Barrow*, 4 K. & J. 409.

(*i*) L. R. 1 Eq. 685. It is clear from the cases of *Barrow* v. *Barrow*, 4 K. & J. 409; *Willoughby* v. *Middleton*, 2 J. & H. 344; *Campbell* v. *Ingilby*, 21 Bea. 567; *Anderson* v. *Abbott*, 23 Bea. 457; *Smith* v. *Lucas*, 18 Ch. D. 531; *Wilder* v. *Pigott*, 22 Ch. D. 263, and *Viditz* v. *O'Hagan*, [1900] 2 Ch. 87, that a married woman can elect to confirm or repudiate a settlement executed by her while an infant; but the principle on which this rule is based is quite different from that applicable to the question discussed in the text. Whether the rule applies where the interest of the married woman in personal property is reversionary, see *Greenhill* v. *North British Co.*, [1893] 3 Ch. 474; *Harle* v. *Jarman*, [1895] 2 Ch. 419. The case of *Williams* v. *Mayne* (Ir. R. 1 Eq. 519) has been already referred to (*ante*, p. 513).

(*k*) 2 Ves. jun. 693. The same rule was acted on in the suit brought by Lord Darlington, as stated in *Cavan* v. *Pulteney*, 2 Ves. jun., at pp. 552-53. See also *Frank* v. *Frank*, 3 Myl. & C. 171.

(*l*) 9 Ves. 350. Some of the old cases seem to show that where the Court held that a married woman was put to her election the original practice was to require her to signify her election before an officer of the Court, and only to direct an inquiry in the event of her failing to do so; see the cases cited in *Gretton* v. *Haward*, 1 Sw. 413, n., and compare *Standering* v. *Hall*, 11 Ch. D. 652.

(*m*) L. R. 7 H. L. 53.

(*n*) *Wilson* v. *Townshend*, 2 Ves. jun. 693.

(*o*) See *Re Davidson*, 11 Ch. D. 341.

(*p*) *Brice* v. *Brice*, 2 Moll. 21; *Spread* v. *Morgan*, 11 H. L. C. 588.

Postponement of election by person under disability.

In some of the older cases, infants have been allowed to postpone their election until after attaining majority (*q*), and in the case of *Williams* v. *Mayne* (*r*), it was held that a married woman could not elect until a reversionary interest, settled on her marriage, fell into possession.

Full knowledge required.

A person is not bound to elect until all the circumstances which may influence his election are known to him (*s*), and an election made in ignorance of material facts is not binding (*t*).

Implied election.

Where there is no express election, it may be implied or inferred from acts. But to raise an inference of election, it should appear that the person knew of his right to elect, and not merely of the instrument giving it (*u*). Even the receipt of income for sixteen years in ignorance of a right to elect will not operate as an election (*x*), though an election may be presumed from possession or receipt of income where there is full knowledge (*y*).

Election is a question of intention, and in general may be inferred from a series of unequivocal acts (*z*). Receiving the income of, or dealing with, a fund or property is in general an election to take that fund or property, if the person was fully cognisant of his rights (*a*).

Possession of both properties.

The mere fact that a person enters into the receipt of the rents and profits of two properties, as it affords no proof of preference, cannot be held an election to take one and reject the other (*b*).

When compensation ascertained.

The amount of the compensation to be made to the disappointed legatees, where the party elects to take against

(*q*) *Ante*, p. 527.

(*r*) Ir. R. 1 Eq. 519, referred to above, p. 513.

(*s*) *Wake* v. *Wake*, 1 Ves. jun. 335; *Boynton* v. *Boynton*, 1 Br. C. C. 445; *Chalmers* v. *Storil*, 2 V. & B. 222; *Dillon* v. *Parker*, 1 Sw. 359; Jac. 505; 1 Cl. & F. 303; *Douglas* v. *Douglas*, L. R. 12 Eq. 617.

(*t*) *Kidney* v. *Coussmaker*, 12 Ves. 136; *Pusey* v. *Desbouvrie*, 3 P. W. 315; *Dillon* v. *Parker*, *supra*.

(*u*) *Morgan* v. *Edwards*, 1 Bli. (N.S.) 401; *Wake* v. *Wake*, 3 Br. C. C. 255; *Reynard* v. *Spence*, 4 Bea. 103; *Wintour* v. *Clifton*, 21 Bea. 447; Watson's Comp. Eq. 184 *seq.*; *Wilson* v. *Thornbury*, L. R. 10 Ch. 239; *Sweetman* v. *Sweetman*, Ir. R. 2 Eq. 141.

(*x*) *Sopwith* v. *Maughan*, 30 Bea. 235.

(*y*) *Butricke* v. *Broadhurst*, 1 Ves. jun. 171; *Worthington* v. *Wiginton*, 20 Bea. 67; *Stratford* v. *Powell*, 1 Ba. & B. 1.

(*z*) *Spread* v. *Morgan*, 11 H. L. C. 588; *Dillon* v. *Parker*, *supra*.

(*a*) *Ardesoife* v. *Bennet*, 2 Dick 463; *Giddings* v. *Giddings*, 3 Russ. 241; *Briscoe* v. *Briscoe*, 1 Jo. & Lat. 334; *Dewar* v. *Maitland*, L. R. 2 Eq. 834; and the cases cited above, notes (*u*), (*x*), and (*y*).

(*b*) *Padbury* v. *Clark*, 2 Mac. & G. 306; *Spread* v. *Morgan*, 11 H. L. C. 588; *Brice* v. *Brice*, 2 Moll. 21; but see *Worthington* v. *Wiginton*, 20 Bea. 67; and generally, as to what acts constitute election, see note to *Dillon* v. *Parker*, 1 Sw. 382; *Giddings* v. *Giddings*, 3 Russ. 241; *Briscoe* v. *Briscoe*, 1 J. & Lat. 334; *Mahon* v. *Morgan*, 6 Ir. Jur. 173; *Ruttledge* v. *Ruttledge*, 1 Dow. & Cl. 331; *Fytche* v. *Fytche*, 19 L. T. 343. As to how far the gain or loss to the person called on to elect is to weigh in presuming election, see *Harris* v. *Watkins*, 2 K. & J. 473.

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the will, is ascertained as at the date of the testator's death (*c*).

Election to accept.

IX.—Onerous Property.—A gift of property by will is supposed, *prima facie*, to be beneficial to the devisee or legatee, and consequently it is also supposed, until the contrary is proved, that the gift is accepted by him. But he is at liberty to refuse or disclaim it, for the law will not compel a man to take property against his will (*d*). Disclaimer may be express or implied (*e*), but there can be no effectual disclaimer after the party has once elected to accept the gift (*f*). And election, like disclaimer, may be inferred from the conduct of the party. Thus if a devisee retains possession for some years of property subject to charges which exceed its value, he may be deemed to have elected to accept the devise (*g*). This, however, does not make him personally liable for the charges (*h*).

Inferred from conduct.

Married woman.

A married woman can disclaim a gift of personal estate although she is restrained from anticipation (*i*).

Two gifts under same will—one may be taken, the other rejected;

Where by the same will two properties are given to the same person, one beneficial and the other burdensome, he is generally at liberty to accept the former and reject the latter (*k*), although by so doing he throws a burden on the testator's general estate, which, if he accepted both, must be borne by himself; as where the repudiated gift comprises shares in a company which, after the testator's death, fails and is wound up, the shareholders being called on to contribute (*l*), or where the subject is leasehold property, in respect of which the testator was liable at his death under his covenant to repair (*m*).

Syer v. *Gladstone.*

So where a testator devised a house, which was mortgaged beyond its value, upon trust to permit his two sisters to have the use and occupation of it and the furniture in it : the furniture was sold and the proceeds invested, and it was held that the sisters were entitled to receive the income of the investments without keeping down the interest on the mortgage debt (*n*).

(*c*) *Re Hancock*, [1905] 1 Ch. 16.

(*d*) Shepp. Touch. 284-85; see Davidson Conv. 5, part 2, p. 661, n., where the law of disclaimer is explained.

(*e*) *Stacey* v. *Elph*, 1 Myl. & K. 195 (disclaimer of trust); *Re Birchall*, 40 Ch. D. 436.

(*f*) *Bence* v. *Gilpin*, L. R. 3 Exch. 76. In *Re Young*, [1913] 1 Ch. 272, a disclaimer was retracted.

(*g*) *Re Cowley*, 53 L. T. 494. (*h*) *Ib.*

(*i*) *Re Wimperis*, [1914] 1 Ch. 502.

(*k*) *Andrew* v. *Trinity Hall*, 9 Ves. 525.

(*l*) *Moffett* v. *Bates*, 3 Sm. & Gif. 468; *Aston* v. *Wood*, 43 L. J. Ch. 715. Putting a distringas on shares does not prevent a subsequent disclaimer: *Hobbs* v. *Wayet*, 36 Ch. D. 256.

(*m*) *Warren* v. *Rudall*, 1 J. & H. 1.

(*n*) *Syer* v. *Gladstone*, 30 Ch. D. 614, explained in *Re Kensington*, *infra*, n. (*p*).

But the question is one of intention, and, therefore, where a testator bequeathed an annuity to A, and also a leasehold house held at a rack-rent beyond its value, Sir J. Leach, M.R., thinking that the plain intention of the testator was that his estate should no longer be subject to the rent of the leasehold house, held that the legatee must take both bequests or neither (*o*). The cases are not easy to reconcile, but the test seems to be whether or not the gifts are separate and distinct. If onerous property and beneficial property are included in the same gift, as an aggregate, then, unless a contrary intention appears by the will, the donee cannot disclaim the onerous property and accept that which is beneficial; he must take the whole gift or nothing (*p*). But if two distinct gifts are made by the same will, one of them being onerous and the other beneficial, the donee may reject the former and take the latter (*q*).

—unless a contrary intention appears.

As to the effect of a disclaimer of a life interest in accelerating future interests, see the cases in the footnote (*r*).

Disclaimer of of life interest.

ESTOPPEL.

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I.—By Possession under Devise.—The general principle that a person who takes possession of land under an instrument is estopped from denying its validity, applies to wills (*s*); consequently if a testator devises Blackacre, which really belongs to X, to A for life with remainder to B, and A enters and retains possession until X's title is extinguished by the Statute of Limitations, A acquires only an estate for life with remainder to

Possession under title.

(*o*) *Talbot* v. *Earl of Radnor*, 3 My. & K. 254; *Fairtlough* v. *Johnstone*, 16 Ir. Ch. 442.

(*p*) *Green* v. *Britten*, 42 L. J. Ch. 187; *Guthrie* v. *Walrond*, 22 Ch. D. 573; *Frewen* v. *Law Life Assurance Society*, [1896] 2 Ch. 511; *Parnell* v. *Boyd*, [1896] 2 Ir. R. 571; *Re Kensington*, [1902] 1 Ch. 203; *Honywood* v. *Honywood*, [1902] 1 Ch. 347. The principle of these cases does not apply to intestacy: *Re Holt*, 115 L. T. 73.

(*q*) *Re Hotchkys*, 32 Ch. D. 408; *Re Lysons*, 107 L. T. 146.

(*r*) *Re Scott*, [1911] 2 Ch. 374; *Re Willis*, [1917] 1 Ch. 365; *Re Conyngham*, [1920] 2 Ch. 495; [1921] 1 Ch. 491; *Re Brooke*, [1923] 1 Ch. 361; [1923] 2 Ch. 265.

(*s*) *Dalton* v. *Fitzgerald*, [1897] 1 Ch. 440; 2 Ch. 86. It is said in the old books that an heir is estopped from denying the will of his ancestor: Br. Abr. Estoppel, pl. 193; but that if A and B are named executors by a will, it is no estoppel for them to say that they were not made executors: *ib.*, pl. 185. As to the old rule that the heir is not presumed to have notice of his ancestor's will, see *Doe* d. *Kenrick* v. *Beauclerk*, 11 East, 667, cited *post*, p. 1455.

B (*t*). The fact that the testator devises the legal estate to trustees, and that adverse possession is taken by one of the beneficiaries, does not make any difference (*u*).

The same principle applies where a devisee takes possession of land which really belonged to the testator, the devisee being under the erroneous belief that it passed by the will. Thus if a testator, being entitled to land in the parishes of X and Y, devises the land in X to A for life, with remainder over, and A takes possession of the land both in X and Y, under the belief that the land in Y passed by the devise, and retains possession for the statutory period, he cannot, it seems, claim to be entitled to the land in Y for his own benefit: "My impression is (if it were necessary to decide the point), that the Statute of Limitations can never be so construed that a person claiming a life estate under a will shall enter, and then say that such possession was unlawful, so as to give his heir a right against the remainderman. I think that no Court would so construe it" (*x*).

Accordingly, in *Kernaghan* v. *M'Nally* (*y*), where the testator devised lands to trustees, and the *cestui que trusts* took possession of certain land which did not pass by the devise, and held it as if they had been beneficially entitled to it under the devise, it was held that the title thus acquired under the Statute of Limitations vested the legal estate in the trustees and not in the beneficiaries.

The decision in *Paine* v. *Jones* (*z*) appears to be inconsistent with this principle. In that case a testator, by will made in 1824, devised all his real estate to A and B upon trust to pay the rents to A for life, with remainders over. Part of the testator's real estate was purchased after the date of the will, and therefore did not pass by it; A entered into possession of the after-acquired land, believing that it passed by the will, and continued in possession for more than twenty years: it was held by Malins, V.-C., that she had acquired a title to the fee against the remainderman. In *Dalton* v. *Fitzgerald* (*a*), Lindley, L.J., thought this decision was intelligible having regard to the facts of the case, but he doubted the soundness of the distinction

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(*t*) *Board* v. *Board*, L. R. 9 Q. B. 48. This and *Dalton* v. *Fitzgerald* (*supra*) are distinguished in *Re Tennant's Estate*, [1913] 1 Ir. R. 280.

(*u*) *Hawksbee* v. *Hawksbee*, 11 Ha. 230, and *Kernaghan* v. *M'Nally*, 12 Ir. Ch. Rep. 89. The question of estoppel did not arise in *Scott* v. *Nixon*, 3 Dr. & W. 388.

(*x*) *Per* Martin, B., in *Anstee* v. *Nelms*, 1 H. & N., at p. 232, quoted with approval by Blackburn, J., in *Board* v. *Board*, L. R. 9 Q. B. 48, and by Lindley, L.J., in *Dalton* v. *Fitzgerald*, [1897] 2 Ch. 86. See the curious case of *Re Coole*, [1920] 2 Ch. 536.

(*y*) 12 Ir. Ch. R. 89.

(*z*) L. R. 18 Eq. 320; *Re Tennant's Estate*, [1913] 1 Ir. R. 280.

(*a*) [1897] 1 Ch. 440; 2 Ch. 86.

drawn by the Vice-Chancellor "between cases of persons having no title under a will, because it does not purport to include the lands they claim, although they believe that it does, and persons claiming under a will which purports to deal with land to which the testator had no title, although they thought he had."

Where devise is illegal.

But if the devise of the remainder is invalid because it transgresses some rule of law—such as the Rule against Perpetuities, or the rules governing charitable gifts—then the entry of the tenant for life under the will does not, it seems, affirm the invalid devise to the remainderman, whether the devise to the tenant for life himself is valid or invalid (*b*).

Where testator under disability.

In *Re Anderson* (*c*) it was held that the same principle applies where the devise is invalid by reason of the personal disability of the testator. In that case the testatrix was married, and acquired the property before 1883.

Legatee bound by erroneous statement in will,

II.—By Erroneous Statement in Will.—Somewhat analogous to the doctrine of estoppel is the rule that in certain cases a person claiming under a will is bound by an erroneous statement of fact contained in it. Thus in *Re Wood* (*d*), a testator gave his property upon trust for his children in equal shares, and after reciting that he had advanced certain sums (specifying the amounts) to four of his sons on account of their respective shares, he directed that "the respective sums hereinbefore recited to have been advanced" should be brought into hotchpot; it was held that the sons were bound by the statement, and could not adduce evidence to show that it was erroneous.

Conversely, if the amount of the advance is understated, the legatee is entitled to the benefit of the error (*e*).

unless result would defeat intention.

But the limits of the doctrine are not satisfactorily settled, and it seems that it will only be applied where the statement of the testator is unequivocal. Thus in *Re Taylor's Estate* (*f*), a testator bequeathed a legacy of £7,000 in trust for his daughter, the wife of J. T., and her children; he then, after reciting (in effect) that he had paid upwards of £5,000 for J. T., directed that if J. T. should not before his death have repaid him £5,000 at least, the sum of £5,000 should be taken in part payment of the £7,000. Taken literally, the effect of this direction would

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(*b*) *Per* Jessel, M.R., in *Re Stringer's Estate*, 6 Ch. D. 1; the decision of the M.R. that the remainder was void was reversed by the C. A., and it became unnecessary to consider the point above stated.

(*c*) [1905] 2 Ch. 70; *Re Tennant's Estate*, [1913] 1 Ir. R. 280.

(*d*) 32 Ch. D. 517, following *Re Aird's Estate*, 12 Ch. D. 291. The case of *Quihampton* v. *Going*, 24 W. R. 917, *ante*, p. 127, seems to have been decided on the same principle.

(*e*) *Burrowes* v. *Clonbrock*, 27 L. R. Ir. 538.

(*f*) 22 Ch. D. 495.

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have been that if J. T. only repaid £4,999 the legacy of the daughter would be reduced by £5,000; it was held that this could not have been the intention, and that what the testator meant was that whatever was owing to him by J. T., up to £5,000, should be satisfied out of the legacy. So in *Re Kelsey* (*g*), a testator after reciting that a legatee of a share of residue owed him £5,000, forgave him £2,000, and directed the balance of £3,000 or so much thereof as should remain unpaid at the time of distribution, to be brought into hotchpot; it was held that the legatee was not bound by the statement as to the debt of £5,000, which was erroneous, and that he was only chargeable with actual advances. Swinfen Eady, J., distinguished between the case of a testator erroneously reciting that a particular sum has been advanced and directing it to be brought into hotchpot, and the case of a testator erroneously reciting that a particular sum has been advanced and directing it "or so much thereof as shall remain unpaid" to be brought into hotchpot; in the former case the legatee is bound by the recital, in the latter case he is not.

Non-disclosure by executor-legatee.

III.—By Conduct.—In *Re Lewis* (*h*), a testatrix bequeathed a leasehold house to a son then abroad, and directed that "in case he should not return and claim the said house," the same should accrue to another son, whom she appointed executor of the will. The executor informed the legatee of the bequest to him of the house, but did not inform him that in the event of his not returning and claiming it the house would go to the executor; the legatee died abroad without having returned to claim the house; it was held that the executor was not estopped from claiming under the gift over.

Estoppel by litigation.

A person who is cognisant of litigation relating to a will, and stands by and takes the benefit of a decision on its construction under which a particular fund is distributed, is estopped from re-opening the question by instituting fresh litigation relating to another fund under the same will (*i*).

A person who is cognisant of proceedings in a Court of Probate in which the validity of a will is questioned, is bound by the result, if he had a right to intervene (*k*).

(*g*) [1905] 2 Ch. 465.

(*h*) [1904] 2 Ch. 656. See *Re Mackay*, [1906] 1 Ch. 25.

(*i*) *Re Lart*, [1896] 2 Ch. 788. See further as to estoppel by *res judicata*: *Peareth* v. *Marriott*, 22 Ch. D. 182; *Badar Bee* v. *Habib Merican Noordin*, [1909] A. C. 615.

(*k*) *Wytcherley* v. *Andrews*, L. R. 2 P. & D. 327, and other cases cited in *Young* v. *Holloway*, [1895] P. 87.

Heir-at-law.

Where the heir-at-law of a testator is made defendant, as one of the testator's next-of-kin, in a probate action to establish the will, and appears and contests its validity, which is established in the action, he cannot afterwards dispute its validity in respect of real estate affected by it, notwithstanding that he was not cited to appear in the action as heir-at-law (*l*).

(*l*) *Beardsley* v. *Beardsley*, [1899] 1 Q. B. 746.

CHAPTER XVII.

EFFECT OF REPUGNANCY OR CONTRADICTION IN WILLS, AND AS TO REJECTING WORDS.

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Provisions inconsistent with ownership.

I.—Provisions wholly Void for Repugnancy.—Before dealing with the question of ascertaining the intention of a testator where the dispositions of the will appear to be contradictory, it should be premised that a provision in a will may be void for repugnancy, apart from the question of intention. Thus where property is given to an adult person absolutely, coupled with a direction that the income shall be applied for his benefit in a certain way, or accumulated, this direction is generally void, being inconsistent with the right of enjoyment which follows from ownership (*a*). So, where a testator bequeathed the residue of his personal estate to his son absolutely, with a direction that it should not be delivered to him till the completion of his twenty-fifth year, it was held that the son was entitled to payment on attaining twenty-one, the direction being rejected as repugnant to the enjoyment of a vested interest (*b*). And where an absolute vested interest is given to a person, an attempt to create a protected interest in the income by directing it to be paid to him by weekly instalments until he attains the age of thirty-five, is nugatory (*c*).

(*a*) *Gurney* v. *Goggs*, 25 Bea. 334; *Saunders* v. *Vautier*, Cr. & Ph. 240; *Gosling* v. *Gosling*, John. 265; *Re Thompson*, 44 W. R. 582; *Re Johnston*, [1894] 3 Ch. 204. In *Harbin* v. *Masterman*, [1894] 2 Ch. 184 (*S. C.*, *s. n. Wharton* v. *Masterman*, [1895] A. C. 186), it was held that the principle applies where the legatee is a charity. As to *Billing* v. *Billing*, 5 Sim. 232, see *post*, p. 1152, n. (*y*).

(*b*) *Rocke* v. *Rocke*, 9 Bea. 66. See *Re Young's Settlement*, 18 Bea. 199; *Re Jacob's Will*, 29 Bea. 402; *Gosling* v. *Gosling*, Johns. 265; *Re Couturier*, [1907] 1 Ch. 470. Compare the cases on the question whether a trust is created by directions as to the application of property given to a person absolutely: Chap. XXIV, *post*, pp. 857 *seq.*

Where property is given to a class of persons with a trust for maintenance until the youngest attains a specified age, this is effectual to postpone distribution: see *Hodson* v. *Micklethwaite*, 2 Dr. 294; *Berry* v. *Briant*, 2 Dr. & S. 1; *Hughes* v. *Hughes*, 3 Br. C. C. 434, and other cases cited *post*, p. 1659.

(*c*) *Re Williams*, [1907] 1 Ch. 180.

In many cases the desired result may be attained by giving the property to trustees subject to a discretionary trust or gift over under which other persons have an interest in the property (*d*).

Restraint on alienation.

On the same principle, a person to whom the ownership of property is given cannot, as a general rule (*e*), be restrained from alienating it, either by express direction (*f*), or by condition (*g*), or by gift over to take effect in the event of his disposing, or attempting to dispose, of it; in such case the gift over is void, and the beneficiary takes absolutely (*h*). So if property is given to a person absolutely, followed by a gift over to take effect on involuntary alienation, such as bankruptcy, the gift over is void (*i*). A provision that the interest of certain beneficiaries under a will shall, in the event of their being precluded by legislation from taking such interest, go over to other persons is not void as being against public policy (*k*).

And a restriction forbidding a particular mode of alienation, such as a mortgage or a charge by way of annuity, is void (*l*).

It seems now settled that that a restraint on alienation is bad even if it is limited in point of time (*m*).

Limits of the doctrine invalidating restraints on alienation.

But a restraint on alienation may be good if it only prohibits alienation to a limited number or class of persons (*n*). Again, a gift over to take effect on the alienation of an interest in property, before it is absolutely vested, may be good (*o*). And a life interest may be made determinable on alienation (*p*). And a married woman may be restrained from anticipation (*q*).

Absolute interests cannot be given to persons in succession.

On the same principle, where there is an absolute gift of property to a person, followed by a gift over in the event of his dying intestate, or not disposing of it, the gift over is, as a general rule, repugnant and void (*r*). And a gift over in the

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(*d*) See cases cited in the preceding notes, and *post*, p. 908; *Gott* v. *Nairne*, 3 Ch. D. 278.

(*e*) As to married women, see *post*, p. 1490.

(*f*) *Hood* v. *Oglander*, 34 Bea. 513.

(*g*) See *post*, pp. 1461 *seq.*

(*h*) *Bradley* v. *Peixoto*, 3 Ves. 324; *Shaw* v. *Ford*, 7 Ch. D. 669; *Re Dugdale*, 38 Ch. D. 176; *Corbett* v. *Corbett*, 14 P. D. 7; *Re Jones's Will*, 23 L. T. 211; *Re Wolstenholme*, 43 L. T. 752; *Re Bourke's Trusts*, 27 L. R. Ir. R. 573.

(*i*) *Re Machu*, 21 Ch. D. 838; *Metcalfe* v. *Metcalfe*, 43 Ch. D. 633; *Re Smith*, [1916] 1 Ch. 369.

(*k*) *Re Schiff*, 65 Sol. J. 174.

(*l*) *Ware* v. *Cann*, 10 B. & Cr. 433; *Willis* v. *Hiscox*, 4 My. & Cr. 197.

(*m*) This question is discussed *post*, p. 1465.

(*n*) See *post*, p. 1463.

(*o*) *Re Porter*, [1892] 3 Ch. 481.

(*p*) *Post*, p. 1470. The interest must be really a life interest, and not part of a series of limitations which in effect give the legatee an absolute interest: *Re Wolstenholme*, 43 L. T. 752.

(*q*) See *post*, p. 1490.

(*r*) *Lightburne* v. *Gill*, 3 Br. P. C. 250; *Ross* v. *Ross*, 1 Jac. & W. 154; *Green* v. *Harvey*, 1 Hare, 428; *Re Yalden*, 1 D. M. & G. 53; *Re Mortlock's*

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event of the devisee or legatee dying intestate is void, even if the interest given to him is contingent (*s*).

Life interest.

In some cases effect has been given to a gift over of "what shall remain," or the like, following the gift of a life interest (*t*).

Annuity.

On the same principle, where a life annuity was given payable by trustees half-yearly, with a gift over, on the death of the annuitant, of so much "as should remain unapplied as aforesaid," the gift over was held void (*u*).

Provision as to user of property may be void for repugnancy.

So a condition or provision requiring a person, to whom property is given, to use it, or not to use it, in a particular way, is invalid if it is inconsistent with "those rights of enjoyment which are inseparably incident to the absolute ownership" (*x*).

Gift over contrary to law.

It may indeed be stated as a general principle that any limitation or gift over, which is not in accordance with the rules governing the devolution and disposition of property, is void. Thus personal property cannot be given to persons in succession, in such a way as to prevent the absolute interest from vesting in accordance with the rules of law (*y*). And if a testator before 1926 gave personal property to A in tail, with remainder to B in tail, and A survived the testator, he took absolutely, and the remainder to B was void. But the death of A in the testator's lifetime may have the effect of making the gift to B valid (*z*).

A gift over on breach of a condition may be void if it does not fit in with the terms of the condition, or is inconsistent with the original gift (*a*).

Trust, 3 K. & J. 456; *Bowes* v. *Goslett*, 27 L. J. Ch. 249; *Henderson* v. *Cross*, 29 Bea. 216; *Gulliver* v. *Vaux*, 8 D. M. & G. 167, n.; *Holmes* v. *Godson*, *ib.* 152; *Barton* v. *Barton*, 3 K. & J. 512; *Perry* v. *Merritt*, L. R. 18 Eq. 152; *Re Wilcock's Settlement*, 1 Ch. D. 229; *Re Percy*, 24 Ch. D. 616; *Re Jenkins' Trusts*, 23 L. R. Ir. R. 162; *Stretton* v. *Fitzgerald*, *ib.* 310, 466; *Parnell* v. *Boyd*, [1896] 2 Ir. R. 571; *Re Walker* (*Lloyd* v. *Tweedy*), [1898] 1 Ir. R. 5; *Re Dixon*, [1903] 2 Ch. 458; *Comiskey* v. *Bowring-Hanbury*, [1905] A. C. 84; *Re Ashton*, [1920] 2 Ch. 481 (dying mentally unfit); *Re Crutchley*, [1912] 2 Ch. 335 (dying intestate and childless). Some of these cases are referred to *ante*, p. 438, in connection with the doctrine of uncertainty. As to *Doe* v. *Glover*, 1 C. B. 448, and *Watkins* v. *Williams*, 3 Mac. & G. 622, see *Shaw* v. *Ford*, 7 Ch. D. 669.

(*s*) *Barton* v. *Barton*, 3 K. & J. 512. (*t*) See *ante*, p. 440.

(*u*) *Re Sanderson*, 3 Jur. (N.S.) 809. The annuitant was in fact *non compos mentis*, although the fact was not referred to in the will; the trustees did not apply the whole annuity for his maintenance; it was held that the surplus formed part of his estate.

(*x*) See the principle stated *post*, p. 1440, where the cases of *Att.-Gen.* v. *Catherine Hall*, Jac. 395, and *Att.-Gen.* v. *Greenhill*, 33 Bea. 193, are referred to. (*y*) *Byng* v. *Lord Strafford*, 5 Bea. 558.

(*z*) *Re Lowman*, [1895] 2 Ch. 348, *post*, p. 540; *Re Dunstan*, [1918] 2 Ch. 304 (freeholds). So in *Carte* v. *Carte*, 3 Atk. 180, it was held that if land is devised to a person in fee, a gift over in the event of his committing treason, is void.

(*a*) *Bird* v. *Johnson*, 18 Jur. 976 (stated *post*, p. 1468 in connection with another doctrine); *Re Catt's Trusts*, 2 H. & M. 46; *Musgrave* v *Brooke*, 26 Ch. D. 792.

Where a testator devised real estate to his son and his heirs, and declared that in case his son should die without leaving lawful issue, then the estate should go over to the son's heir-at-law to whom he gave and devised the same accordingly : it was held by the Court of Appeal that the gift over was repugnant and void, and that the son took an absolute estate in fee simple (*b*).

In *Shaw* v. *Ford* (*c*), Fry, J., said that "any executory devise, defeating or abridging an estate in fee by altering the course of its devolution, which is to take effect at the moment of devolution and at no other time, is bad"; but this statement appears to be too wide (*d*).

Restriction on right of owner to sell.

Re Elliot.

In *Re Rosher* (*e*) it was held that a condition annexed to a devise in fee requiring the devisee, in the event of his selling the property, to offer it to A at a certain price, was repugnant and void. Again, in *Re Elliot* (*f*) a testator gave all his property, including his tea plantations, to A, and provided as follows : "On any sale of the said tea plantations, I direct her [A] to pay to B £1,000 out of the proceeds of such sale" : it was held that this direction was repugnant and void. So if an absolute gift to a person is followed by a clause cutting it down in the event of his embracing a religious life, this proviso is repugnant and void (*g*).

Estate tail.

Conditions and gifts over intended to restrict alienation by a tenant in tail are, as a general rule, repugnant and void, as explained elsewhere (*h*).

Examples of valid gift over.

In *Re Sax* (*i*) a testator bequeathed his business together with a leasehold messuage to his sons, subject to a proviso that if the sons ceased to carry on the business, the leasehold messuage should fall into residue : North, J., held that the proviso was not repugnant to the gift, and that it took effect on the conversion of the business into a private company.

A gift over in the event of the original gift being held void at law or in equity, is valid (*k*).

Where gift over becomes valid *ex post facto.*

It was held by Romilly, M.R., that where there is an absolute gift to A, with a gift over to B in the event of A dying

(*b*) *Re Parry and Daggs*, 31 Ch. D. 130. The principle is a very old one : *Tilbury* v. *Barbut*, 3 Atk. 617. Compare *Gulliver* v. *Vaux*, 8 D. M. & G. 167, n., and the cases there cited.

(*c*) 7 Ch. D. 669, at p. 673.

(*d*) *Re O'Hare* (*Madden* v. *McGiven*), [1918] 1 Ir. R. 160.

(*e*) 26 Ch. D. 801, *post*, p. 1463.

(*f*) [1896] 2 Ch. 353.

(*g*) *Re Thompson*, 44 W. R. 582.

(*h*) *Post*, p. 1466.

(*i*) 62 L. J. Ch. 688.

(*k*) *De Themmines* v. *De Bonneval*, 5 Russ. 288 (deed). Compare *Re Crawshay*, 43 Ch. D. 615, cited *post*, p. 821.

without having disposed of the property, and A dies in the testator's lifetime, so that the gift to him lapses, the gift over nevertheless fails (*l*). This view was dissented from by James, L.J. (*m*), on the ground that there can be no repugnance where the original gift never takes effect at all. And having regard to the present disposition of the Courts to pay more attention to the wishes of testators than to technical doctrines, it seems clear that the decisions of Romilly, M.R., would not now be followed. The general principle is that "where there are successive limitations of personal estate in favour of several persons absolutely, the first of them who survives the testator takes absolutely, although he would take nothing if any other legatee had survived and taken. . . . The doctrine of repugnance has no application to gifts which fail. . . . This is entirely in accordance with the opinion expressed by James, L.J., in *Re Stringer's Estate*, already referred to, and is good sense" (*n*). In *Re Dunstan* (*o*) this principle was applied to real estate.

Rule in case of contradiction or repugnancy.

II.—Construction of Contradictory Provisions.—Mr. Jarman states the general rule thus : (*p*) "Doubt is sometimes cast upon the intention of a testator by the repugnancy or contradiction between the several parts of his will, though each part, taken separately, is sufficiently definite and intelligible. In such cases the context (which is so often successfully resorted to for the purpose of throwing light on a doubtful passage) becomes itself the source of obscurity; and, unless some principle of construction can be found authorising the adoption of one, and the rejection of the other of the contrariant parts, both are necessarily void, each having the effect of neutralising and frustrating the other. With a view to prevent this most undesirable result, it has become an established rule in the construction of wills, that where two clauses or gifts are irreconcilable, so that they cannot

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(*l*) *Hughes* v. *Ellis*, 20 Bea. 193; *Greated* v. *Greated*, 26 Bea. 621.

(*m*) *Re Stringer's Estate*, 6 Ch. D. 15.

(*n*) *Per* Lindley, L.J., in *Re Lowman*, [1895] 2 Ch. 357, *ante*, p. 538 In *Andrew* v. *Andrew* (1 Coll. 690) a testator bequeathed consumable articles to his sister for her life, or so long as she should remain unmarried, "in either event then to go over to" A. The sister married in the testator's lifetime. It was held by Sir J. K. Bruce, V.-C., that the gift over was void. There was no express reference, he observed, to the happening of any event in the testator's lifetime; the testator meant death or marriage whensoever happening, not death or marriage happening only in his lifetime. "The words were intended to operate by way of remainder. It is a gift to her so long as she shall be living unmarried, and then over. Now the gift of consumable articles to a woman so long as she shall be living unmarried is the gift of an absolute interest. The gift over, therefore, is void, nor rendered valid by the circumstance of the legatee having survived the testator and married in his lifetime." This decision also would probably not be followed at the present day.

(*o*) [1918] 2 Ch. 304.

(*p*) First edition, p. 411.

possibly stand together, the clause or gift which is posterior in local position shall prevail, the subsequent words being considered to denote a subsequent intention : *Cum duo inter se pugnantia reperiuntur in testamento, ultimum ratum est* (*q*). Hence it is obvious that a will can seldom be rendered absolutely void by mere repugnancy : for instance, if a testator in one part of his will gives to a person an estate of inheritance in lands, or an absolute interest in personalty, and in subsequent passages unequivocally shows that he means the devisee or legatee to take a life interest only, the prior gift is restricted accordingly" (*r*).

Clear gift not cut down by doubtful expressions.

It must be borne in mind, however, that the rule only applies where the later gift shows with reasonable certainty that the testator did not mean the prior gift to take effect according to its terms (*s*).

Absolute gift cut down to limited interest.

The simplest example of the general rule is where a gift to A, apparently absolute, is cut down to a life estate by a subsequent direction that on A's death the property is to go to B. There are numerous authorities to this effect (*t*). But the subsequent direction must be unambiguous (*u*).

And where there is an absolute gift of property to A, with a gift over to B in the event of A dying without having disposed of it, or a gift to B of "what remains" at A's death, the question of the effect of these words is often a difficult one, and the authorities, as might be expected, are not wholly consistent (*x*).

Gift over not "fitting" condition.

Where there is gift upon condition, followed by a clause of forfeiture or gift over, which does not "fit" the condition, the effect may be that the latter clause is ineffectual and the gift absolute (*y*).

Whether absolute interest cut down in any event.

Where property is given to a person without limitation or qualification, followed by a direction that at his death it is to be divided among his children, the question arises whether he takes

(*q*) Co. Litt. 112, b; *Ulrich* v. *Litchfield*, 2 Atk. 372; *Sims* v. *Doughty*, 5 Ves. 243; *Constantine* v. *Constantine*, 6 Ves. 100; *Doe* d. *Leicester* v. *Biggs*, 2 Taunt. 109; see also *Chandless* v. *Price*, 3 Ves. 99; *Wykham* v. *Wykham*, 18 Ves. 421; *Marks* v. *Solomon*, 18 L. J. Ch. 234; 19 L. J. Ch. 555.

(*r*) It will be remembered that Mr. Jarman is here dealing only with those cases where the two repugnant gifts are contained in the same testamentary instrument; if one of them is contained in a will and the other in a codicil, the question is one of revocation : see Chap. VII.

(*s*) *Post*, p. 549.

(*t*) The general rule is recognised in *Constable* v. *Bull*, 3 De G. & S. 411; *Bibbens* v. *Potter*, 10 Ch. D. 733; and was applied in *Re Russell*, 52 L. T. 559, and *Re Houghton*, 53 L. J. Ch. 1018. See also Chap. XXXVI. As to the difference between "at the death" and "after the death," see *Re Hutchinson's Trusts*, 21 Ch. D. 811.

(*u*) *Re Jones*, [1898] 1 Ch. 438, distinguishing *Re Pounder*, 56 L. J. Ch. 113; *Re Percy*, 24 Ch. D. 616, *post*, p. 550; *Re Bourke's Trusts*, 27 L. R. Ir. 573.

(*x*) *Ante*, pp. 437 *seq.*; *post*, p. 1168.

(*y*) See *Re Catt's Trusts*, 2 H. & M. 46, and *Musgrave* v. *Brooke*, 26 Ch. D. 792, both cited *ante*, p. 538.

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nothing more than a life interest in any case, or whether the subsequent direction is only to take effect in the event of his leaving children, so that if he leaves none the absolute gift remains in force. Thus in *Joslin* v. *Hammond* (*z*) a testator gave to his wife A, whom he appointed executrix, the whole of his property, on condition of her paying to his mother £130 per annum during her life, and added, "at the death of my dear wife A, the whole of the property to be equally divided amongst those of my children who may survive her"; and should his wife marry again, the testator directed that each of his children at the age of twenty-four be paid £400; should she not marry, he left them implicitly to her kind and indulgent care. No child of the testator survived the widow. It was contended, therefore, that the widow was absolutely entitled, on the ground that the absolute interest which she would have taken under the first words of the will, was cut down to a life interest only in a certain event which had not happened; but Leach, M.R., considered that, upon the whole context of the will, it was the intention of the testator that in no event the wife should have other than a life estate. "If," said his Honor, "at her death a child or children survived her, they were to take the property between them; but he has not provided for the case of all the children dying during the life of his wife, and that event having happened, he has so far died intestate. It is not a probable intention to be imputed to the testator, that, if his children died in the lifetime of his wife, leaving families, his widow, on her second marriage, should enjoy the whole property." His Honor did not advert to the annuity to the mother.

Joslin v. *Hammond.*

Crozier v. *Crozier.*

On the other hand, in *Crozier* v. *Crozier* (*a*), a testator gave all his property to his wife, "and after her death to be equally divided to the children, should there be any": the testator had only one child, who was born after the date of the will and predeceased the testator: it was held by James, L.J., that the gift to the wife was absolute, and only to be cut down in the event of there being children: there being none, she took absolutely. The learned Judge remarked that the testator clearly did not mean to die intestate, which would be the effect of giving the wife only a life interest (*b*).

The question whether the original gift is an absolute gift, with a subsequent gift in derogation, or whether it is a mere

(*z*) 3 My. & K. 110. See *Lassence* v. *Tierney*, 1 Mac. & G. 551; *Waters* v. *Waters*, 26 L. J. Ch. 624, and the other cases discussed *post*, pp. 1432 *seq.*

(*a*) L. R. 15 Eq. 282. See *Bell* v. *Jackson*, 1 Sim. (N.S.) 547; *Salmon* v. *Salmon*, 29 Bea. 27.

(*b*) See also *Monck* v. *Croker*, [1900] 1 Ir. R. 56, *post*, p. 1432.

life interest with subsequent limitations, may be affected by the interposition of trustees (*c*).

In *Re Hutchinson's Trusts* (*d*) property was given to A and B share and share alike, and after their decease to their children share and share alike, and to their heirs for ever; A died without issue and B died leaving issue: it was held by Kay, J., that as the absolute gift to each was only cut down in favour of his children, the property was, in the events which had happened, divisible in moieties between the representatives of A and the children of B.

The general rule stated by Mr. Jarman applies even where the apparently absolute nature of the prior gift is emphasised by the use of words of limitation.

Posterior of two inconsistent clauses preferred;

As in *Crone* v. *Odell* (*e*), where a testator devised the residue of his real and personal property to his children, A, B, and C, and all their younger children, their heirs, executors, administrators and assigns, for ever; so far it was a clear joint devise; but he went on to declare that, nevertheless, his intentions were, that A should receive the entire interest or yearly produce of such part of his real or personal fortune as he (testator) intended for his (A's) younger children during his life. The testator then made a similar direction as to B and C; and he provided that, in case any of his said three children should die, the share of such should go to the younger children of such children; if no younger children, to the survivors; and he gave the parents a power of distribution among their younger children. Lord Manners determined that the parents took life interests only, with a power of distribution among their younger children; which decree was affirmed in D. P.

So, in *Sherratt* v. *Bentley* (*f*), where a testator after bequeathing several legacies, devised unto his wife a certain messuage and all other his real estates, and his household goods and all other his personal estate, to hold to his said wife, her heirs, executors, administrators and assigns, for ever. The testator then directed that none of the legatees should be entitled until twelve months after his wife's decease; and, in case his wife should happen to die in his lifetime, and the before-mentioned devises and bequest to her should thereby lapse, the

(*c*) *Ib.*: *Scawin* v. *Watson*, 10 Bea. 200.

(*d*) 21 Ch. D. 811; see *Re Rubbins*, 78 L. T. 218; 79 L. T. 313, and *Re Browne's Will Trusts*, [1915] 1 Ch. 690.

(*e*) 1 Ba. & Be. 449 (*Odell* v. *Crone*), 3 Dow, 61; see also *Roe* d. *James* v. *Avis*, 4 T. R. 605.

(*f*) 2 My. & K. 149. See also *Re Brooks' Will*, 2 Dr. & Sm. 362; *Gravenor* v. *Watkins*, L. R. 6 C. P. 500, *post*, p. 1782; *Estate of Lupton*, [1905] P. 321.

testator gave the estate and effects, as well real as personal, comprised therein, to S, his heirs, executors, administrators and assigns, to the use of such persons as his wife should, in her lifetime, by writing under her hand appoint. The testator then gave some pecuniary legacies, and proceeded to devise and bequeath to W. A. and his (the testator's) brother-in-law's children the residue of his real and personal estates, to be equally divided amongst them, share and share alike, at the decease of his said wife. The heir-at-law contended that the will was void for uncertainty, on account of the repugnance between the gift to the wife, her heirs, executors, administrators and assigns, and the subsequent gift of the residue to others, to be divided at her decease. The person claiming under the wife contended that the pecuniary legacies and the gift of the residue were only to take effect in the event of her decease in the testator's lifetime; but Sir J. Leach, M.R., was of opinion that the Court was not warranted in putting such a construction upon the will, for that the testator's general intention, as collected form the concluding passages in his will, was to give the wife the full enjoyment during her life only, and to give it over to the persons named afterwards; and that the words "heirs, executors, administrators and assigns," were to be rejected; and his Honor referred, as one of the grounds of his decision, to the rule, that the latter part of a will shall prevail against inconsistent expressions in the prior part of it. On appeal, Lord Brougham affirmed the decree, observing that either the testator had changed his intention and was minded to give his wife a life estate instead of the fee, or he was ignorant of the force of the words he had originally used, and those words must be rejected as having been used by mistake. The former alternative was the one to which the rule, sanctioned by the authorities (which he stated in detail), led. The latter was the inference drawn, not unfairly, from the whole instrument taken together.

In *Hare* v. *Westropp* (*g*) the testator gave all his property to his wife, and then gave all the rest, residue and remainder of his estate and effects to trustees upon trust for his wife for life, with remainder to his children : it was held that the wife took a life interest in the whole of the testator's property.

—but prior devise not unnecessarily disturbed.

"But in these cases," as Mr. Jarman points out (*h*), "it is a settled and invariable rule not to disturb the prior devise farther

(*g*) 9 W. R. 689. But where there are two residuary gifts to different persons, the prior gift, if clear and distinct, will prevail unless the testator shows with reasonable certainty that he means the later gift to take effect : see *post*, p. 1004.

(*h*) First ed. p. 414.

than is absolutely necessary for the purpose of giving effect to the posterior qualifying disposition."

Doe v. *Davies.*

As in *Doe* d. *Amlot* v. *Davies* (*i*), where a testator devised all his messuage and garden in the occupation of D, and also all that his messuage and garden wherein he then resided, both situate in P., to trustees and their heirs, upon trust to pay the rents to his wife during widowhood, and after the determination of that estate, to the use of his children by his said wife, equally to be divided between them and the lawful issue of their or his bodies or body, and, in default of such issue, to his nephew D. The testator immediately afterwards gave to his daughter F a pecuniary legacy when she attained the age of twenty-one years, and the house where she then lived, after the decease of her mother or the day of intermarriage; and the testator gave to his daughter R a legacy in like manner, and the house then in the occupation of D, after the decease of her mother or the day of her intermarriage. The two houses last referred to were those comprised in the previous devise. It was admitted that, under the first devise, the daughters would have been tenants in common in tail of the two houses, but, as the second devise clearly indicated an intention to give one of the houses to each daughter, the whole was in some degree reconciled by holding each to take an estate for life in severalty in her own house under the latter devise, (which contained no words of inheritance), leaving the prior devise still to operate on the inheritance in remainder, of which it made the two daughters tenants in common in tail expectant on the estate for life of each in the respective houses.

Devise annulled by subsequent inconsistent devise in same will;

"The doctrine in question," says Mr. Jarman (*k*), "has been sometimes unsparingly applied, even where the effect of the posterior devise is not merely (as in the last two cases) to restrict and qualify the interest conferred by the prior devise, but wholly to defeat and frustrate such prior devise. Thus in *Ulrich* v. *Litchfield* (*l*), where a testatrix bequeathed her real *and personal estate* to A and B equally for life, and, upon the death of A, she gave the whole estate to B in tail, with remainder over, with a few pecuniary legacies, and charged her real estate with the payment of the legacies, if the personalty should be insufficient. The testatrix then gave *all the residue of her personal estate* to her uncle C's three daughters. Lord Hardwicke held the daughters to be entitled to the residue of the personal estate, considering that the testatrix must be presumed

(*i*) 4 M. & Wels. 599. See also *Crossman* v. *Bevan*, 27 Bea. 502; *Spence* v. *Handford*, 4 Jur. (N.S.) 987, 27 L. J. Ch. 767.
(*k*) First ed. p. 415.
(*l*) 2 Atk. 372.

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to have altered the intention expressed in the prior part of her will.

—the whole to be reconciled, if possible.

"But the rule which sacrifices the former of several contradictory clauses is never applied but on the failure of every attempt to give to the whole such a construction as will render every part of it effective (*m*). In the attainment of this object the local order of the limitations is disregarded, if it be possible, by the transposition of them, to deduce a consistent disposition from the entire will. Thus, if a man, in the first instance, devise lands to A in fee, and in a subsequent clause give the same lands to B for life, both parts of the will shall stand; and, in the construction of law, the devise to B shall be first (*n*), the will being read as if the lands had been devised to B for life, with remainder to A in fee.

"So where (*o*) a testator, after devising the whole of his estate to A, devises Blackacre to B, the latter devise will be read as an exception out of the first, as if he had said, 'I give Blackacre to B, and subject thereto, all my estate, or the residue of my estate, to A.'

Devise qualified by subsequent disposition.

"By parity of reason, where (*p*) a testator gives to B a specific fund or property at the death of A, and in a subsequent clause disposes of the whole of his property to A, the combined effect of the several clauses, as to such fund or property, is to vest it in A for life, and, after his decease, in B.

"Again (*q*), where a testator gave his real and personal estate to A, his heirs, executors and administrators, and in a subsequent part of his will gave all his property to A and B, upon trust for sale, and to pay the interest of the proceeds to A for life, and at her decease, upon trust to pay certain legacies, leaving the residue undisposed of, A was held to be entitled, under the first devise, to the beneficial interest in reversion, not exhausted by the trust for the payment of legacies created by the second (*r*).

Effect of separate contrariant devises, each in fee.

"Sometimes it happens that the testator has, in several parts of his will, given the same lands to different persons *in fee*. At

(*m*) *Langham* v. *Sandford*, 19 Ves. 649; *Shipperdson* v. *Tower*, 1 Y. & C. C. C. 459; *Briggs* v. *Penny*, 3 De G. & S. 539; *Jackson* v. *Forbes*, Taml. 88; *Brocklebank* v. *Johnson*, 20 Bea. 205.

(*n*) *Per* Anderson, *Anon.*, Cro. El. 9; see also *Ridout* v. *Dowding*, 1 Atk. 419; *Plenty* v. *West*, 6 C. B. 201; *Usticke* v. *Peters*, 4 K. & J. 437.

(*o*) *Cuthbert* v. *Lempriere*, 3 M. & Sel. 158; see also *Anon.*, Dalison, 63; *Adams* v. *Clerke*, 9 Mod. 154; *Allum* v. *Fryer*, 3 Q. B. 442; *Roe* d. *Snape* v. *Nevill*, 11 Q. B. 466.

(*p*) *Blamire* v. *Geldart*, 16 Ves. 314.

(*q*) *Brine* v. *Ferrier*, 7 Sim. 549.

(*r*) In point of fact, in this case the inconsistent gifts were contained in several papers supposed to be written at different times; but as the Ecclesiastical Court had allowed them to be proved as one will, they were, of course, to be so construed.

first sight this seems to be a case of incurable repugnancy, and, as such, calling for the application of the rule, which sacrifices the prior of two irreconcilable clauses, as the only mode of escaping from the conclusion that both are void. Even here, however, a reconciling construction has been devised, the rule being in such cases, according to the better opinion, that the devisees take concurrently (*s*). The contrary, indeed, is laid down by Lord Coke (*t*) and other early writers (*u*), who say that the last devise shall take effect; and a similar opinion seems to have been entertained by Lord Hardwicke, though he admitted that, latterly, a different construction had prevailed (*x*). The point underwent much discussion in *Sherratt* v. *Bentley* (*y*), already stated; and Lord Brougham, after reviewing the authorities, and fully recognising the general doctrine, which upholds the latter part of a will by the sacrifice of the former to which it was repugnant, considered that, consistently with this rule, it might be held that, where there are two devises in fee of the same property, the devisees take concurrently. 'If, in one part of a will,' he said, 'an estate is given to A, and afterwards the same testator gives the same estate to B, adding words of exclusion, as "not to A", the repugnance would be complete, and the rule would apply. But if the same thing be given, first to A, and then to B, unless it be some indivisible chattel, as in the case which Lord Hardwicke puts in *Ulrich* v. *Litchfield*, the two legatees may take together without any violence to the construction. It seems, therefore, by no means inconsistent with the rule as laid down by Lord Coke, and recognised by the authorities, that a subsequent gift, entirely and irreconcilably repugnant to a former gift of the same thing, shall abrogate and revoke it, if it be also held that, where the same thing is given to two different persons in different parts of the same instrument, each may take a moiety; though, had the second gift been in a subsequent will, it would, I apprehend, work a revocation.' "

Both take concurrently.

It is laid down by Lord Hardwicke in *Ulrich* v. *Litchfield* (*z*), that the two devisees, if they take concurrently, are joint tenants; this is supported by several old authorities (*a*), and appears to have been assumed by Lord Brougham, who speaks

Whether as joint tenants or tenants in common.

(*s*) 3 Leon. 11, pl. 27; 8 Vin. Abr. Devise, 152, pl. 3; arg. in *Coke* v. *Bullock*, Cro. Jac. 49, and in *Fane* v. *Fane*, 1 Vern. 30.
(*t*) Co. Litt. 112.
(*u*) Plow. 541.
(*x*) See *Ulrich* v. *Litchfield*, 2 Atk. 374.
(*y*) 2 My. & K. 165, *ante*, p. 543.
(*z*) 2 Atk. 372.
(*a*) 14 Vin. Ab. 485, pl. 2; *Anon.*, Cro. El. 9; *Wallop* v. *Darby*, Yelv. 210; Co. Litt. 21 a, n. (4).

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of their joint estate (*b*). When he speaks (as above) of each taking a "moiety," it is only as opposed to either taking the whole to the exclusion of the other. In *Ridout* v. *Pain* (*c*), Lord Hardwicke says, that "latterly such a devise has been construed either a joint tenancy or tenancy in common, according to the limitations"; and this it is said must be presumed to mean, "that if the two estates given by the will have the unity or sameness of interest in point of quantity essential to a joint tenancy, the devises shall be joint tenants, but otherwise shall be tenants in common" (*d*). Now, as both devisees are supposed to have vested estates in fee, this interpretation points to their being joint tenants. Independently of authority this seems the preferable construction, as less violence is thereby done to the testator's language than by making them tenants in common, as the creation of a tenancy in common requires positive intention.

Whether doctrine applies to an indivisible chattel.

It is observable that both Lord Hardwicke and Lord Brougham considered that the doctrine in question did not apply to a single indivisible chattel; but such an exclusion, as Mr. Jarman points out (*e*), is attended with difficulty, "for though, certainly it may seem rather absurd that a testator should give a horse or a watch to several persons concurrently, yet it is impossible to say that there may not be such an intention; and where is the line to be drawn? Is it to depend upon the greater or less convenience attending a joint or concurrent enjoyment of the subject of gift?"

Apparent inconsistency reconciled by reference to lapse.

Sometimes where an estate in fee is followed by apparently inconsistent limitations, the whole has been reconciled by reading the latter disposition as applying exclusively to the event of the prior devisee in fee dying in the testator's lifetime, the intention being, it is considered, to provide a substituted devisee in the case of lapse (*f*); or by understanding the latter devise to be dependent on a certain contingency mentioned in the will, though such contingency may not clearly appear to be attached to it (*g*).

Instances of devises reconciled.

The anxiety of the Courts to adopt such a construction as will reconcile and give effect to all parts of a will is further exemplified by *Holdfast* d. *Hitchcock* v. *Pardoe* (*h*), where a testator devised to A a farm in the occupation of C, and to B lands in L. Marsh; and it appeared that part of the farm in the occupation of C consisted of lands in L. Marsh; but there was

(*b*) 2 My. & K. 166.
(*c*) 3 Atk. 493.
(*d*) Co. Litt. 112 b, n. (1), by Harg.
(*e*) First ed. p. 418.
(*f*) *Clayton* v. *Lowe*, 5 B. & Ald. 636; but see remarks on this case *post*, p. 2097.
(*g*) *Ley* v. *Ley*, 2 M. & Gr. 780.
(*h*) 2 W. Bl. 975; see also *Woolcomb* v. *Woolcomb*, 3 P. W. 111.

another estate, not in his occupation, consisting entirely of marsh lands in L.; and it was held, that the subsequent devise was not, as contended, a revocation of the preceding devise, but that A took the farm, and B the marsh lands not included in that farm.

So, where (*i*) a testator devised to A "her heirs, executors and administrators," a house in T. Street (describing it), and in distinct clauses gave her several other houses, "the whole of which premises were in the borough of Plymouth, during her natural life," but should A have children, "the before-mentioned houses" to descend to them; but if she should die without issue (which happened), then the "said premises" to become the joint property of the children of X. The house included in the first devise being, as well as all the rest, in the borough of Plymouth, it was contended that it went with them to the children of X. But it was held, that although the words were not perfectly accurate, yet they could not intend that the testator meant by the subsequent words to cut down the estate in fee first given.

Mr. Jarman also cites the case of *Bettison* v. *Rickards* (*k*) as being, "perhaps, the strongest authority of this kind."

Clear gift not cut down by doubtful expressions.

These cases also exemplify a rule which is certainly not of less frequent application than that enunciated at the beginning of this section, *viz.*, that where there is a clear gift in a will it cannot be cut down by subsequent words which are not clear and decisive (*l*). They need not (as sometimes stated (*m*)) be equally clear with the gift. "You are not to institute a comparison between the two clauses as to lucidity" (*n*). But the clearly expressed gift naturally requires something unequivocal to show that it does not mean what it says. Thus if a testator gives all his property to A and in a later part of the will appoints B his residuary legatee, the general rule is that this does not affect the gift to A (*o*), and lapsed legacies go to A, not to B (*p*). So where a testator made a careful and elaborate disposition of the residue of his property in favour of his sons and daughters and a

(*i*) *Doe* d. *Bailey* v. *Sloggett*, 5 Exch. 107.

(*k*) 7 Taunt. 105.

(*l*) *Thornhill* v. *Hall*, 2 Cl. & F. 22; *Re Segelcke*, [1906] 2 Ch. 301.

(*m*) For example, by Knight Bruce, L.J., in *Kiver* v. *Oldfield*, 4 De G. & J. 30.

(*n*) *Per* Lord Campbell, *Randfield* v. *Randfield*, 8 H. L. C. 225, where the rule was held inapplicable. For further instances of the application of the rule, see *Clavering* v. *Ellison*, 3 Drew. 451; *Re Larkin*, 2 Jur. (N.S.) 229; *Walmsley* v. *Foxhall*, 1 D. J. & S. 605; *Kerr* v. *Clinton*, L. R. 8 Eq. 462; *Crozier* v. *Crozier*, L. R. 15 Eq. 282; *Re Bywater*, 18 Ch. D. 17; *Re Viscount Exmouth*, 23 Ch. D. 158. And see this rule further discussed, *post*, pp. 554 *seq.*

(*o*) *Davis* v. *Bennet*, 30 Bea. 226; *Kilvington* v. *Parker*, 21 W. R. 121; *Re Jessop*, 11 Ir. Ch. R. 424.

(*p*) *Johns* v. *Wilson*, [1900] 1 Ir. R. 342; *Re Isaac*, [1905] 1 Ch. 427. See the cases referred to in detail, *post*, p. 1004.

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grandchild in unequal shares with clauses of accruer, and then made a gift of his residue to the same persons in equal shares, it was held by Fry, J., that the first gift prevailed (*q*). Again, in *Re Spencer* (*r*), where the testator filled up the first blank in a printed form by giving all his real and personal property to certain persons, after which came a full printed form of residuary gift in which he inserted the names of four other persons : it was held that there was nothing on which the residuary clause could operate, and that the prior gift must prevail (*s*).

Re Spencer.

Absolute gift not cut down to estate for life by vague words.

In *Hoare* v. *Byng* (*t*) a testator left all his personal estate and all his landed estates to his wife for life, and "afterwards" all his personal and landed estates to his sister for her life, and "then" to the eldest son of B and "afterwards" to B's second, third, or any later sons, and "then" to the eldest and other sons successively of C : it was contended that the words "then" and "afterwards" showed an intention to give B's eldest and other sons nothing more than life interests, but it was held that the eldest son of B took the personal estate absolutely. All the Judges laid stress on the fact that where the testator intended to give estates for life, estates for life were in terms given. This element was absent in the case of *Re Percy* (*u*), where a testator, by an extremely short and concise will, bequeathed to his wife £10,000 "afterwards to go to the understated residuary legatee E" : it was held by Bacon, V.-C., that the gift to the wife was absolute, and not cut down to a life interest by the "inept words" which followed it. But it is not very easy to see why the word "afterwards" should be considered more inept than the words "at her death," following an absolute gift (*x*).

Re Percy.

Rule as to the rejection of words.

III.—Rejection of Words.—"It is clear," says Mr. Jarman (*y*), "that words and passages in a will, which are irreconcilable with the general context, may be rejected, whatever may be the local position which they happen to occupy; for the rule which gives effect to the posterior of several inconsistent clauses must not be so applied as in any degree to clash or interfere with the doctrine which teaches us to look for the intention of a testator in the general tenor of the instrument,

(*q*) *Bristow* v. *Masefield*, 52 L. J. Ch. 27. *Fitzpatrick* v. *Knaresborough*, 13 Ir. Eq. R. 338, seems to have been the converse of this case.

(*r*) 54 L. T. 597.

(*s*) As to the construction of a will written on a printed form, see *Re Harrison*, 30 Ch. D., at p. 394.

(*t*) 5 Bea. 558 (*Byng* v. *Strafford*); 10 Cl. & F. 508.

(*u*) 24 Ch. D. 616. This case is also referred to *ante*, p. 439.

(*x*) *Ante*, p. 541.

(*y*) First edition, p. 420. It will be remembered that where words have been inserted in a will by mistake, they are sometimes omitted from the probate; *ante*, p. 32.

and to sacrifice to the scheme of disposition so disclosed any incongruous words and phrases which have found a place therein.

"Thus, in *Boon* v. *Cornforth* (*z*), where a testator bequeathed the interest of £6,000 stock to his daughter for life, and after her decease, upon trust to dispose of the principal and interest to and between her husband and his (testator's) daughter's child and children, *viz.*, her husband should have and enjoy one-half of the interest thereof for and during his natural life, if there should be *no child or children* (the words in italics were interlined (*a*)), and the child or children the other half; on his death his half should go to the child or children, but till the child or children attained twenty-one the husband should have the whole interest, and on the death of their father, they should have the remaining £3,000; but if no such child or children at the time of her death, or they should die before twenty-one, then to go on further trust as he should thereafter mention—Lord Hardwicke rejected the interlined words, as inconsistent and repugnant with the whole disposition, his Lordship being of opinion that he had no alternative but that of rejecting either these or the entire provision.

Passage at variance with context rejected.

"So, in the case of *Coryton* v. *Helyar* (*b*), where a testator devised lands to the use of his son *for ninety-nine years*, and, after the determination of that estate, to the use of trustees during the life of the son, to preserve contingent remainders; and, after the decease of the son, to the use of his first and other sons in tail male—Lord Hardwicke held that the term was, with reference to the true construction of the several parts of the will, to be construed, not as an absolute term, but as determinable with the decease of the son.

"In several instances inconsistent words engrafted on a prior clear and express devise have been rejected.

Ambiguous words inconsistent with prior devise rejected.

"Thus, where (*c*) the devise was to A and her heirs, *for their lives*, Lord Ellenborough rejected the latter words; which, he said, were merely the expression of a man ignorant of the manner of describing how the parties whom he meant to benefit would

(*z*) 2 Ves. sen. 277; *Robinson* v. *Waddelow*, 8 Sim. 134; *Jones* v. *Price*, 11 Sim. 557; *Aspinall* v. *Audus*, 7 M. & Gr. 912; *Hanbury* v. *Tyrell*, 21 Bea. 322; *Campbell* v. *Bouskell*, 27 Bea. 325 ("aforesaid nephews," "aforesaid" rejected); *Smith* v. *Crabtree*, 6 Ch. D. 591 ("living at the death or second marriage of my wife" rejected).

(*a*) *Lunn* v. *Osborne*, 7 Sim. 56, affords another instance of the rejection of words which had been interlined by a testator, and were at variance with the general context.

(*b*) 2 Cox, 340. See, for other examples of powers or interests reduced within a limited period by force of the context, *Waltington* v. *Waldron*, 4 D. M. & G. 259; *Chapman* v. *Gilbert*, *ib.* 366.

(*c*) *Doe* d. *Cotton* v. *Stenlake*, 12 East, 515. See also *Towns* v. *Wentworth*, 11 Moo. P. C. C. 545; *Hugo* v. *Williams*, L. R. 14 Eq. 224; and *Re Mountgarret*, [1919] 2 Ch. 294.

enjoy the property; for whatever estate of inheritance the heirs might take, they could in fact only enjoy the benefit of it for their own lives." And where (*d*) a testator gave to his wife, her heirs and assigns for ever, his house and other property, with the intention that she might enjoy the same during her life, and by her will dispose of the same as she thought proper; it was contended that the wife took only a life interest with a testamentary power of appointment; but the Court held, that the latter part of the clause did not cut down the clear gift of a fee simple contained in the former part, and that the testator merely meant to mention all the incidents of a fee which occurred to him at the time (*e*).

So, where (*f*) a testatrix bequeathed an annuity, to be equally divided between M. B., C. S., and C. A., "to them and their heirs, or the survivor of them, in the order they are now mentioned," Sir W. Grant rejected the latter words as repugnant.

The embarrassment often caused by cases of this description is exemplified by *Morrall* v. *Sutton* (*g*), where a testator limited life interests in his leasehold property charged with certain annuities, with remainder to S. C., "her executors, administrators and assigns, subject to the said annuities charged thereon during her natural life." The general rules above mentioned were acknowledged on all hands; but there was a difference of opinion upon the question, whether or not sufficient evidence of the testator's intention could be collected from the context to authorise the rejection of the words "during her natural life," so as to give S. C. the absolute interest; for, in the absence of such evidence, those words being placed last must, according to the general rule, overrule the preceding words "executors, etc.," thereby limiting S. C.'s interest to a life-estate. The case was ultimately compromised.

Where there is a gift to a limited class of children or issue, with a gift over in default of "such children," or "such issue," it may appear that the word "such" was not used in its proper sense, and it may be rejected or modified accordingly (*h*).

(*d*) *Doe* d. *Herbert* v. *Thomas*, 3 Ad. & Ell. 123; 4 Nev. & M. 696. See also *Brocklebank* v. *Johnson*, 20 Bea. 205; *Pasmore* v. *Huggins*, 21 Bea. 103.

(*e*) If there had been a gift over in the event of the wife not disposing of the property the construction would have been different: see *Re Stringer's Estate*, 6 Ch. D. 1, and the other cases cited in Chap. XXIII.

(*f*) *Smith* v. *Pybus*, 9 Ves. 566; see also *Jesson* v. *Wright*, 2 Bligh, 1, and other cases of the same class discussed, Chap. XLIX.; and *Reece* v. *Steel*, 2 Sim. 233; *Townley* v. *Bolton*, 1 My. & K. 148; *Harvey* v. *Harvey*, 5 Bea. 134; *Re Bywater*, 18 Ch. D. 17.

(*g*) 4 Bea. 478; 1 Phil. 533. Compare *Bunbury* v. *Doran*, Ir. R. 9 C. L. 284, where a testator devised to P. and M. a certain property "until I am able to live there and enjoy it myself": these words were rejected, as being inconsistent with the normal operation of a testamentary disposition.

(*h*) *Post*, pp. 667, 1922 *seq.*

The "blundering attorney's clerk."

Where inappropriate words have apparently been inserted by mistake in a will showing signs of having been carefully and skilfully prepared, the Court sometimes assumes that they were inserted by some "blundering attorney's clerk," and rejects them (*i*).

Words not to be expunged, unless inconsistent.

"But words are not to be expunged," says Mr. Jarman (*k*), "upon mere conjecture, nor unless actually irreconcilable with the context of the will, though the retention of them may produce rather an absurd consequence (*l*).

"Thus, where (*m*) a testator after bequeathing certain property to Thomas Brailsford, son of his nephew Samuel Brailsford, devised his real estates 'to the use of *the said* Thomas Brailsford and his assigns, for and during the term of his natural life, and after his decease, to the use of *the said Thomas Brailsford, son of my nephew, Samuel Brailsford*, his heirs and assigns, for ever.' The only Thomas Brailsford mentioned in the will was the son of Samuel, but the testator had another nephew of that name (who was uncle of the legatee), to whom, therefore, it was contended, that the devise to '*the said* Thomas Brailsford' applied, though he was not before named, according to the case in Hawkins (*n*), that father and son having the same name, the son, not the father, is distinguished by an addition (*o*). The words 'the said,' it was observed, might be considered surplusage; and that the devise was either void for uncertainty, or, there must be an inquiry. But Sir William Grant said, that it was impossible to contend that there was, *prima facie*, any ambiguity in the description; by the words, 'the same Thomas Brailsford,' the Thomas Brailsford who had been before mentioned was sufficiently described. 'The argument on the other side,' said his Honor, 'rests chiefly on the inconsistency of giving to the same person, in the same sentence, an estate for life and also an estate in fee; there is certainly a particularity in that; *but the devise as it stands is not so insensible or contradictory as to drive the Court to the necessity of expunging or adding words to give it a meaning*'; and this decree was affirmed by Lord Eldon on appeal (*p*).

(*i*) *Re Dayrell*, [1904] 2 Ch. 496. The expression was first used by Bacon, V.-C., in *Re Redfern*, 6 Ch. D. 133, *post*, p. 564, n. (*f*).

(*k*) First edition, p. 423.

(*l*) Quoted by Russell, J., in *Re Evans*, [1920] 2 Ch., at p. 309. See *Mellish* v. *Mellish*, 4 Ves. 45, where the inference that a name had been inserted by mistake, was very strong.

(*m*) *Chambers* v. *Brailsford*, 18 Ves. 368.

(*n*) 2 Hawk. P. C. 271, s. 106.

(*o*) See also *Goodright* d. *Hall* v. *Hall*, 1 Wils. 148.

(*p*) 19 Ves. 652; 2 Mer. 25; see also *Roe* v. *Foster*, 9 East, 405; *Ridgeway* v. *Munkittrick*, 1 D. & War. 90, 91; *Ridout* v. *Pain*, 3 Atk. 493; *Langley* v. *Thomas*, 6 D. M. & G. 645.

CHAPTER XVII.

Devise not controlled by reason assigned.

"And though *repugnant* expressions will yield to an intention and purpose expressed, or apparent upon the general context, yet it does not appear that a bequest actually made, or a power given can be controlled merely by the reason assigned. The assigned reason may aid the construction of doubtful words, but cannot warrant the rejection of words that are clear (*q*). Thus, where (*r*) a testator expressed his conviction of the honour and justice of his trustees, and made that conviction the ground of his reposing in them the trust of distributing his property among his relations, authorising them to fix both the objects and the proportions, but afterwards gave the power in express terms, to them, *and the heirs, executors and administrators of the survivor of them*—Sir W. Grant, M.R., observed : 'Though it seems very incongruous and inconsequential to extend to unknown and unascertained persons the power which personal knowledge and confidence had induced the testator to confide to his original trustees and executors, yet I am not authorised to strike these words out of the will, upon the supposition, though not improbable, that they were introduced in this part by inadvertence or mistake."

Distinct gift not cut down by vague words.

IV.—Distinct Gift not controlled by Ambiguous Context.—Again, it is a general rule, that a devise in general terms shall not, even though the result may be to render it inoperative, be held to control another devise made in distinct terms. Thus, in *Borrell* v. *Haigh* (*s*), where a testatrix devised all her messuages, cottages, closes, lands and hereditaments at H. to A, and afterwards gave all her copyhold estates and hereditaments at N. and T. "and elsewhere"; and it appeared that the only place besides N. and T., in which the testatrix had copyholds, was H. : Lord Langdale, M.R., held, nevertheless, that the prior devise, which *per se* clearly carried the copyholds at H., was not defeated by the vague expression which followed. *Greenwood* v. *Sutcliffe* (*t*) was decided on the same principle. In *Mann* v. *Fuller* (*u*) there was a bequest of £2,000 to A and his children, followed by legacies to other persons, and then a bequest of £1,000 to A, "in addition to one thousand before mentioned" : it was held that this did not cut down the former legacy to £1,000.

(*q*) *Per* Sir W. Grant, 16 Ves. 46; and see 4 Ves. 808; *Thompson* v. *Whitelock*, 5 Jur. (N.S.) 991.

(*r*) *Cole* v. *Wade*, 16 Ves. 27. The general principle laid down by the M.R. as to the transmission of powers involving personal confidence, was dissented from by Farwell, J., in *Re Smith*, [1904] 1 Ch. 139; see *post*, p. 911.

(*s*) 2 Jur. 229. See also *Sidebotham* v. *Watson*, 11 Hare, 170 (4th question).

(*t*) 14 C. B. 226.

(*u*) Kay, 624.

Clear devise not controlled by subsequent inaccurate words of reference.

"It is to be observed, too," says Mr. Jarman (*x*), "that a devise of lands, in clear and technical terms, will not be controlled by expressions in a subsequent part of the will, inaccurately referring to the devise, in terms which, had they been used in the devise itself, would have conferred a different estate, if the discordancy appear to have sprung merely from a negligent want of adherence to the language of the preceding devise.

"Thus, where (*y*) a testatrix devised lands to her eldest daughter A. S., *and the heirs of her body* for ever, with remainder over, charged with a sum of money to be raised out of the yearly profits; and the testatrix declared it to be her will that her executors (thereinafter named) should stand seised of the lands until they should have raised the said sum, or until the same should be discharged by A. S. *and her heirs*; and after the raising or payment thereof by the said A. S. *or her heirs*, then that A. S. *and her heirs* should enjoy the said lands for ever (*z*). It was held that the word 'heirs' of A. S. thrice repeated, referred to the special designation of heirs to whom the estate was devised in the beginning of the will, and were not intended to introduce a new and more general denomination of heirs, and to revoke the express estate tail given in the beginning of the will.

"So, where (*a*) the devise was to A and the heirs *male* of his body, and, in case he should die *without issue*, then over, the words 'without issue' were held to mean without issue *male*.

"Both the preceding cases exhibit deficiency, rather than repugnancy of expression, and will serve, therefore, not inaptly to conduct to the commencing subject of the next chapter."

(*x*) First edition, p. 425.

(*y*) *Doe* d. *Hanson* v. *Fyldes*, Cowp. 833.

(*z*) The words "for ever" were not strictly repugnant, as an estate tail is capable of perpetuity of duration.

(*a*) *Tuck* v. *Frencham*, Moore, 13 pl. 50 (*Buck* v. *Frencham*) 1 And. 8; see also *Ellicombe* v. *Gompertz*, 3 My. & Cr. 127; *Hillersdon* v. *Lowe*, 2 Hare, 355; *Mortimer* v. *Hartley*, 3 De G. & S. 332.

CHAPTER XVIII.

AS TO SUPPLYING, TRANSPOSING, AND CHANGING WORDS.

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Supplying blanks.

I.—As to Supplying Words.—The question whether parol evidence is admissible to supply blanks left in a will has been already considered (*a*).

Words may be supplied, when.

Where it is clear on the face of a will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words which he has omitted, those words may be supplied (*b*) in order to effectuate the intention, as collected from the context (*c*).

"Without issue" supplied.

Of this we have a very simple example in an early case, where a devise to A and the heirs of his body, and, if he should die, then over, was read "and if he should die without issue" (*d*). So, where (*e*) a man having three sons, John, Thomas, and William, devised lands to John, his eldest son, and the heirs of his body, after the death of Alice, the devisor's wife; and declared that if John died, living Alice, William should be his heir. And the testator devised other lands to Thomas, and the heirs of his body, and, if he died without issue, then that John should be his heir; and he devised other lands to William and the heirs of his body, and, if all his sons should die without heirs of their bodies, then that his lands should be to the children of his brother. John died in the lifetime of Alice, leaving a son; and the Court held, that, upon the whole context of the will, the

Spalding v. *Spalding.*

(*a*) *Ante*, Chap. XV, p. 491.

(*b*) This is generally done by the Court of Construction and not by the Court of Probate: but if the missing words bear on the question of probate, they may be supplied: *In b. Morony*, 1 L. R. Ir. 483.

(*c*) *Towns* v. *Wentworth*, 11 Moo. P. C. 526; *Hope* v. *Potter*, 3 K. & J. 206; *per* K. Bruce, L.J., 3 De G. & J. 266, 267; *Mellor* v. *Daintree*, 33 Ch. D. 198. The general principle laid down by Knight-Bruce, L.J., in *Key* v. *Key*, 4 D. M. & G., at p. 84, was approved by Swinfen Eady, J., in *Phillips* v. *Rail*, 54 W. R. 517. The principle as stated in Hawkins on Wills is quoted by Joyce, J., in *Re Haygarth*, [1913] 2 Ch., at p. 15.

(*d*) *Anon.*, 1 And. 33; see also *Atkins* v. *Atkins*, Cro. El. 248. The cases of *Coryton* v. *Helyar*, 2 Cox, 340; *Doe* v. *Fyldes*, Cowper, 833; and *Tuck* v. *Frencham*, Moore 13, pl. 51, cited in the last chapter (*ante*, pp. 551, 555), illustrate the same principle.

(*e*) *Spalding* v. *Spalding*, Cro. Car. 185.

construction should be "if John died without issue, living Alice"; and that this was the intent appeared, it was said, by other parts of the will, the other sons having other lands to them and the heirs of their bodies; and that if they all died without issue, it should be to his brother's children, not meaning to disinherit any of his children. And it was declared not to be a contingent remainder or limitation to abridge the former express limitation.

"Without issue" read "without leaving issue."

And in several instances where a testator, in a will made before the year 1838, had used the phrase "without leaving issue" and "without issue" indifferently, in bequests of personalty, in regard to which alone (as hereinafter shown) the difference of expression is material, the word "leaving" has been supplied, in order to produce uniformity, which, it was considered, must have been intended (*f*).

Words "under twenty-one" supplied.

Again, in *Kirkpatrick* v. *Kirkpatrick* (*g*), where a sum of money was bequeathed to J. and S. to be equally divided; but in the event of the death of either of them before he attained the age of twenty-one years, and without issue, his share to go to the survivor; but in the event of both dying without issue, then over; Lord Erskine, on the authority of *Sheppard* v. *Lessingham* (*h*), supplied the words "under twenty-one," in the ulterior bequest.

"On marriage" read "at twenty-one or marriage."

The case of *Lang* v. *Pugh* (*i*) was of the same kind. A testator gave a sum of money, in trust for his son T. for life, and after his death for his lawful issue if then of age or married, equally if more than one, if only one the whole to go to such only child; or in case such child or children of his son should be under age at the death of the son, then "to be divided or paid to him, her, or them, in manner aforesaid, on their attaining their respective age or ages of twenty-one years, if sons, or if daughters, on their marriage respectively." Sir K. Bruce, V.-C., read the will as if it had been written, "or, in the case of daughters marrying earlier,

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(*f*) *Sheppard* v. *Lessingham*, Amb. 122. See also *Radford* v. *Radford*, 1 Kee. 486, where freeholds and leaseholds were combined in the same devise. And see *Greenway* v. *Greenway*, 1 Gif. 131; 2 D. F. & J. 128. Cf. *Pye* v. *Linwood*, 6 Jur. 618. As regards wills made since 1837 it is provided by section 29 of the Wills Act that words in a devise or bequest importing failure of issue are to mean issue living at the death unless a contrary intention appears by the will. See further on this point, *post*, Chap. LII.

(*g*) 13 Ves. 476; see also *Wheable* v. *Withers*, 16 Sim. 505. But see *Else* v. *Else*, L. R. 13 Eq. 196. In *Radley* v. *Lees*, 3 M. & Gr. 327, the codicil showed that the testator's intention would be defeated by supplying the words there proposed to be inserted in the will.

(*h*) Amb. 122.

(*i*) 1 Y. & C. C. C. 718; see also *King* v. *Cullen*, 2 De G. & S. 252; *Woodburne* v. *Woodburne*, 3 *ib.* 643. So, in *Re Dear*, 61 L. T. 432, where there was a gift to the testator's widow so long as she should remain unmarried, with a gift over on her death, Kay, J., held that the words "or marriage" must be supplied.

upon marriage"; he thought it improbable that the testator could "have meant a daughter of T. surviving her father, and having attained majority in her father's lifetime, to take the fund or a portion of it absolutely, though never married, but that he meant altogether to exclude any daughter, a minor at her father's death, if not then married, unless she should at some period of her life marry."

"Dying" read "dying without leaving a child."

Again, in the leading case of *Abbott* v. *Middleton* (*j*), a testator gave an annuity of £2,000 to his wife for life, and directed funds to be set apart for securing it, "and on her decease the sums provided and set apart for such payment to become the property of my son A so far as he the said A my son shall receive the interest on such sum during his life, and on his demise the principal sum to become the property of any child or children he may leave, and in such sums as my said son shall will and direct; but in case of my son dying before his mother, then and in that case the principal sum to be divided between the children of my daughters" B, C, and D. The son A having died before his mother but leaving a child, the question was, whether the words "without leaving any child" could be supplied after the word "dying" in the final gift over, so as to leave the child of A in possession of the property, and it was held by Romilly, M.R., that those words must be supplied. Referring to *Spalding* v. *Spalding* (*k*), he said the principal ground of the decision there seemed to him to be the expression of the testator's intention that the heirs of the body of the first son should take, and it was to be observed that they could take only by descent through the father, whereas in the present case they took vested interests direct from the testator. The judgment of the M.R. was affirmed in the House of Lords, principally on the same ground (*l*). A clear gift was not to be devested but by an unmistakable provision to that effect (*m*).

Elliptical expression supplied; but an event not contemplated will not be provided for.

In the foregoing cases the testator had used expressions that were, or were considered to be, plainly elliptical. Some contingency or state of circumstances that was present to his mind was

(*j*) 21 Bea. 143; 7 H. L. C. 68. And see *Brotherton* v. *Bury*, 18 Bea. 65; *Re Mitchell*, 108 L. T. 180.

(*k*) *Ante*, p. 556.

(*l*) By Lords Chelmsford and St. Leonards; Lords Cranworth and Wensleydale diss. Whether the words were supplied or not the will remained incomplete. If they were not supplied, the testator's bounty to his grandchildren would depend on their father's surviving his mother, which appeared unreasonable. If they were supplied, and the son survived his mother and died leaving no child, the fund would not go to the children of the daughters but would fall into the residue.

It should be noted that the general canon of construction laid down by Lord Cranworth in this case has often been cited with approval: see *Gordon* v. *Gordon*, L. R. 5 H. L. 254.

(*m*) See *Hope* v. *Potter*, 3 K. & J. 206.

Eastwood v. *Lockwood.*

imperfectly described. But the Court cannot provide for an event which appears to have been absent from the testator's mind, however strange the omission may be. Thus in *Eastwood* v. *Lockwood* (*n*), where a testator disposed of all his property on trusts for the maintenance of his children until Hannah, the youngest, attained twenty-one; and as soon as she attained that age he disposed of his personal estate among certain of his children; and as to a specified part of his real estate, he devised it to his son A in tail male, subject to a certain charge; and as to other specified parts, he devised one to each of his other sons in tail male, with a gift over "in case of any of his said sons should die during the minority of Hannah, or in the event of any of them dying without such lawful issue as aforesaid, and either before or after their or his share should be divisible according to the provisions of the will" (*i.e.*, before Hannah attained twenty-one); A died before that time leaving issue, and it was argued, on the authority of *Spalding* v. *Spalding* (*o*), that his estate was not cut down. Sir W. P. Wood, V.-C., agreed that the words "in case of any son dying during the minority of Hannah" standing alone would have brought the case within that authority: but the words that followed made it different. The testator had put two classes of events together. He had said, "I point to a dying in the one case *simpliciter* during a given epoch. I point to a dying without issue in the other case generally, either before or after Hannah attains twenty-one." It was true that in one sense the second alternative might be included in the first, yet still it was emphatic; and although it seemed strange to suppose that he meant it in this sense, yet if he did, he could hardly have expressed himself more clearly. Notwithstanding the existence of issue, therefore, the estate of A was divested and went over.

The principle of supplying omitted words has been applied in numerous other cases, from which the following have been selected, as affording apt examples of its application.

Words supplied to provide for an alternative event, obvious, though not expressed.

Thus, where (*p*) a testator having two sisters, A. H. and M. J., and also two cousins, F. and G., devised his estate at A. to his sister A. H. for life, remainder to his sister M. J. for life, remainder to another person for life, remainder to F. in tail, remainder to G. in tail, with remainders over; and then devised another estate at B. "to his sister M. J. for life, or if she should survive his wife and sister A. H., so that she should come into

(*n*) L. R. 3 Eq. 487.

(*o*) *Ante*, p. 556.

(*p*) *Doe* d. *Leach* v. *Micklem*, 6 East, 486; see also *Webb* v. *Hearing*, Cro. Jac. 415; *Anon.*, 2 Vent. 363; *Pearsall* v. *Simpson*, 15 Ves. 29; Lord Eldon's judgment in *Doe* d. *Planner* v. *Scudamore*, 2 B. & P. 296.

possession of the estate at A.," then to L. J. for life, towards the support of his cousins F. and G., remainder to the said G. in fee. M. J. survived the testator's widow, but not his sister A. H., and it was therefore contended that the remainder to L. J. and G. failed; but the Court decided, that, as the word "or" so placed was unintelligible, being referable to no other alternative; and as it was apparent from the whole context that the testator had in contemplation another alternative, namely, the death of his sister M. J., and that he meant to make a provision after the death of his sisters for his cousin G. as well as his cousin F., which was not satisfied by only giving G. a remainder in tail after a remainder in tail to his brother F.; in order to render the sentence complete and sensible, and to give effect to the apparent intent of the testator, the necessary words might be supplied to make the devise read as a gift to his sister M. J. for life, and after her death, or if she should survive his wife (*q*) and sister A. H., so that she should come into possession of the estate at A., then over to L. J., who consequently took a vested remainder, and was entitled in the events that had happened.

Object supplied by reference to preceding devise.

"But no case, probably," says Mr. Jarman (*r*), "has gone further in supplying words in compliance with the intention appearing by the context, than *Doe* d. *Wickham* v. *Turner* (*s*), where the testator's deficiency of expression left the devise without an object. The will was in these words: 'I give unto H. W. a messuage or tenement now in the possession of W. *Item*, I give further unto my nephew H. W. half part of my garden, and £100 stock in the 4 *per cent.* Bank annuities. *I give, further, my yard, stables, cowhouse, and all other outhouses in the said yard*, my sister M. W. to have the interest and profits during her life.' The question was, whether the nephew was entitled to the yard under this devise. The Court (Best, J., diss.) decided in the affirmative: for as the testator had used the word 'further' in the preceding part of his will, when he made an additional gift to the same devisee, and as the clause would otherwise have been senseless and inoperative the words 'to him' might be supplied, and then it was a devise to M. W. for life, remainder to her son H. W. *in fee*" (*t*).

(*q*) It does not distinctly appear why the death of the wife is introduced; but probably she had a life estate in the property at A; or, perhaps, it was because the wife had a life annuity of £50 out of estate A; and that, therefore, M. J. was not intended to lose estate B till after the cesser of that charge upon her interest in estate A.

(*r*) First edition, p. 431.

(*s*) 2 D. & Ry. 398.

(*t*) "There must be a mistake in this, as the will was destitute of any ground for raising a fee in the devisees, and it was not necessary for the

Driver v. *Driver.*

A stricter construction was followed in *Driver* v. *Driver* (*u*): there the testator gave all his property to his executor upon trust for the purposes of his will, and gave £300 to his daughter, and 5s. a week to his son J. D.; he then gave other property to his son R. D., and his daughter in equal shares, and proceeded as follows: "I further order that after paying the before-mentioned £300 to my daughter, and the aforesaid legacy to my son J. D., I give and bequeath the remainder of my property, of what nature or kind soever it may be [specifying various descriptions of property] and other property of which I may die possessed, and I nominate and appoint my son R. D. sole executor of this my last will and testament." Bacon, V.-C., refused to insert the word "to" after the words "of which I may die possessed" and held that there was an intestacy as to the residue.

Words supplied to preserve others.

Words are often supplied if, without them, other words would be inoperative. Thus, "if a man by his last will devise lands or tenements to a man and to his heires male, this by construction of law is an estate taile, the law supplying these words (of his bodie)" (*v*).

Limitation to second and every other son to be begotten held to include eldest son.

In *Langston* v. *Pole* (*w*), where a testator, passing over the first son of A (his son and devisee for life), proceeded to limit the estate to the "second, third, fourth, fifth, and all and every other the son and sons of the body, sons of A lawfully to be begotten severally and successively in remainder in seniority of age and priority of birth" in tail male and then to the first and other daughters of A in like manner; on a case from Chancery the Court of C. B. supplied the vacancy in the series of limitations, by holding the first son to take an estate tail immediately expectant on his father's decease. It appears that the Court of B. R. had come to an opposite conclusion upon the same will. Neither Court gave reasons. The decision of the Court of C. B. was affirmed in D. P. Lord Brougham relied on the trusts of a term, which were, in case there should be only one son and one daughter, to raise a portion for the daughter; an absurd provision, if the daughter herself took the estate, as she would, under the circumstances, unless the son did. However, he was of opinion that the phrase "other sons" included the first son, and therefore the decision of the Court below was right, without supplying any words (*x*).

Court to determine *the quantity* of the devisee's interest." (Note by Mr. Jarman.)

(*u*) 43 L. J. Ch. 279. (*v*) Co. Litt. 27a. See *post*, p. 1800.

(*w*) 2 M. & Pay. 490; 5 Bing. 228, Taml. 119, and in D. P. *nom. Langston* v. *Langston*, 8 Bli. (N.S.) 167; 2 Cl. & Fin. 194; Sugd. Law of Prop. 370; referred to in *Re Haygarth*, [1913] 2 Ch., at p. 15. See also *Newburgh* v. *Newburgh*, Sugd. Law of Prop. 367; *Re Blake*, 19 W. R. 765.

(*x*) See also *Clements* v. *Paske*, 3 Dougl. 384; cit. 1 M. & Sel. 130; 2

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Same expression held on context of will to exclude eldest son.

But although the general rule of construction as regards wills is to extend the words "to be begotten" to issue begotten before the date of the will (*y*), yet the rule is not so absolute but that it will give way upon indication of a contrary intention appearing from other parts of the will. Thus, in *Locke* v. *Dunlop* (*z*), where a testator devised real estate to the use of his second son F for life, with remainder to the use of his first and other sons in tail male, with remainder to the use of the testator's third son J for life, with remainder to the use of his first and other sons in tail male, with remainder in the following words: "And for default of such issue to the use of my fourth, fifth and all and every other son and sons of my body on the body of my said wife to be begotten, born, or *en ventre sa mère* at the time of

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Cl. & Fin. 230, n. The devise was to trustees during the life of J. C., upon trust for J. C. for life, and after his decease, to the eldest son of J. C., and for default of such issue, then likewise to the second, third, and every other son of J. C. successively, according to seniority, and the several and respective heirs male of the body and bodies of such (omitting the first son) second, third. or other son or sons, the *eldest of such sons* and the heirs male of his body being always preferred to and take before any of the younger sons and the heirs male of his body, and, in case of such issue male failing by J. C., then over. It was held in B. R. that the eldest son of J. C. took an estate tail, and not an estate for life. Lord Mansfield seems to have chiefly relied on the word "likewise," as indicating an intention that the first son should have the same estate as the younger sons, and not on the word "other" as (according to Lord Brougham's judgment in *Langston* v. *Langston*) he might have done. In *Owen* v. *Smyth*, 2 H. Bl. 594, Eyre, C.J., doubted whether words such as those which afterwards occurred in *Langston* v. *Langston*, could in a deed be considered to give an estate tail to the eldest son. In *Barnacle* v. *Nightingale*, 14 Sim. 456, there was a devise to A for life, and, after his decease, to his first son, and, for default of such issue, to the second, third, etc., and all and every other son and sons of A, and the heirs of his or their bodies lawfully issuing, the elder always to be preferred and to take before the younger of such sons and the heirs of his body: Shadwell, V.-C., decided that the limitation to the heirs of the body of the first son had been omitted, and could not be supplied, and that such son took only an estate for life. The Court of B. R. decided the direct contrary on the same will, *Doe* d. *Harris* v. *Taylor*, 10 Q. B. 718; and with the latter decision agrees *Galley* v. *Barrington*, 2 Bing. 387, in which, upon a settlement expressed in very similar words, the Court of C. B. held that the limitation "to the heirs of the body" included the heirs of the body of the first as well as of the second and younger sons; and *Owen* v. *Smyth*, 2 H. Bl. 594, where the limitations in a deed were to the use of N. for life, remainder to the use of the first son of N., and for default of such issue to the use of the second, third, and all and every other son and sons of N. successively, and of the several heirs male of the body and bodies of *all and every such son and sons*, so that the elder of such sons and the heirs male of his and their bodies should always take before the younger of the same sons and the heirs male of his and their body and bodies; and it was held that the words in italics included the first son as well as the others and gave him an estate tail. It must be observed that the authority of *Doe* v. *Taylor* is impaired by the reasons given for the decision, *viz.*, that the words "for default of such issue" did not, as is the universal rule, mean for default of such issue as took under the previous limitation, that is, "for default of such first son," but meant "for default of issue of such first son," and that the first son, therefore, took an estate tail by implication. See *post*, Chap. LII. and *Re Arnold's Estate*, 33 Bea. 163.

(*y*) Co. Lit. 20 b.; *Hebblethwaite* v. *Cartwright*, Cas. t. Talb. 31; *Hewet* v. *Ireland*, 1 P. Wms. 426; *Doe* v. *Hallett*, 1 M. & S. 124; *Early* v. *Benbow*, 2 Coll. 342; *Almack* v. *Horn*, 1 H. & M. 630.

(*z*) 39 Ch. D. 387, affirming the decision of Stirling, J., *ib.*

my decease, severally, successively, and in remainder one after another, as they and every of them shall be in seniority of age and priority of birth," in tail male, with remainder to the use of the testator's daughters "begotten or to be begotten, born, or *en ventre sa mère* at the time of my decease," equally as tenants in common in tail; all the testator's sons except the eldest having died without issue male, it was held by the Court of Appeal, that, having regard to the various limitations of the will, the words "to be begotten," etc., must be construed strictly, and that the eldest son was excluded from taking.

It may, indeed, be stated as a general rule, that mere conjecture or inference is not a sufficient ground for adding words to a will (*a*).

Words supplied to make limitations consistent with context.

It is clear, however, that words and even clauses, may be supplied in a set or series of limitations or trusts, from which they have been omitted without apparent design, where those limitations or trusts as they stand are inconsistent with the context, and the context shows what must be added to remove the inconsistency. Thus in *Parker* v. *Tootal* (*b*), where the testator devised land to A for life, with remainder to the first son of A severally and successively in tail male, the words "and other sons" were introduced, in order to prevent the words "severally and successively" from being in effect struck out of the will. So in *Greenwood* v. *Greenwood* (*c*), where a testator gave his real and personal estate to trustees on trust to sell and invest the sale moneys, and "pay the moneys and the investment for the time being representing the same to my wife during her life upon trust for all my children or any child who, being sons, shall attain twenty-one, or being daughters, shall attain that age or marry, in equal shares"; with power for the trustees, "after the death of my wife, or previously thereto if she shall so direct, to raise any part not exceeding one half of the then expectant presumptive or vested share of any child under the trusts hereinbefore declared" for the advancement of the child; and "after the death of my wife" to apply the whole or a part "of the income of the share to which any child shall for the time being be entitled in expectancy under the trusts hereinbefore declared" for maintenance of the child: and, in default of children, "then from and after the death of my said wife and such default of children," over. The question was whether the wife had a beneficial interest for her life in the fund, and it was held by the L.JJ. that she had. Sir W. James observed that if the will had

(*a*) See *Jennings* v. *Newman*, 10 Sim. 219; *Eastwood* v. *Lockwood*, L. R. 3 Eq. 487; *ante*, p. 559.
(*b*) 11 H. L. C. 143.
(*c*) 5 Ch. D. 954.

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ended with the gift to the children in equal shares, it would have been difficult to alter the natural meaning of the words, which imported a gift to the wife during her life in trust for the children, giving the latter an estate *pur autre vie* only. But when they read the powers of advancement and maintenance, which were powers dealing after the death of the wife with what the testator treated as already given to the children, it was evident that the natural meaning of the previous words could not be the true one, these powers being utterly inconsistent with the view that the previous trust for children was one determining with the wife's life; they were driven therefore to separate the words in the gift to the children from the gift to the wife for life, the words "after her death" being implied after the gift of her life estate.

Re Daniel's Trusts (*d*), which was the case of a postnuptial settlement, was decided on the same principle.

Sweeting v. *Prideaux.*

Again, in *Sweeting* v. *Prideaux* (*e*), where a testator bequeathed £16,000 in trust to pay the income of one moiety to his daughter A for life for her separate use, and after her death to divide that moiety among her children, or failing children among her statutory next-of-kin; and to pay the income of the other moiety to his daughter B for life "in the same manner in every respect, and subject to the same control as he had before directed as to A, it being his intention that his said daughters' fortunes should not be subject to the control of their husbands." He then gave £6,000 in trust for his son C for life, and after his death for his children, and failing children to form part of his estate; and he empowered the trustees to apply the income of the £16,000 and £6,000 for the maintenance of his said daughters' or son's children as they might think proper. B died leaving children, and it was held by Hall, V.-C., that they were by implication entitled to the moiety given to B for life. He said: "The daughters were treated collectively, it being his intention that their 'fortunes' should be alike, and the income was not only given to them but there was a provision for maintenance of his 'said daughters' and son's children.' There was a separate provision for the heads of the three families."

Other instances of words implied.

Acting on the principle laid down in the cases cited above, Bacon, V.-C., in *Re Redfern* (*f*), held that a trust for the

(*d*) 1 Ch. D. 375. The remarks on this case by Mr. Vincent in the 4th and 5th editions of the present work have been omitted, as the case is not relevant to the law of wills.

(*e*) 2 Ch. D. 413; see also *Re Smith*, 45 L. T. 246. And as to interests created by reference, see *post*, p. 664.

(*f*) 6 Ch. D. 133. It was in this case that the V.-C. made his well-known allusion to "blundering attorney's clerks and law-stationers" as persons who are often responsible for obscure wills. *Ante*, p. 553, n. (*i*).

children of one of the five daughters of the testator must be implied. North, J., in *Mellor* v. *Daintree* (*g*), held that an absolute gift of a moiety of the testator's estate to the testator's nephew must be implied; in *Re Hunt* (*h*) the words "shall attain the age of twenty-one years" were interpolated in a limitation to daughters, who would otherwise have taken vested interests only in the event of their marrying under that age; in *Re Patterson* (*i*), words giving a life interest to the widow of a tenant for life were interpolated; in *Re Wroe* (*k*) the residuary gift was construed as if the word "child" was inserted in it; and in *Phillips* v. *Rail* (*l*) limitations in strict settlement were supplied from a corresponding devise of other realty in the same will; and in *Re Haygarth* (*m*) an omission was supplied in a hotchpot clause.

"Respective."

There are several cases in which the word "respective" or "respectively" has been added in order to carry out the testator's intention (*n*).

Other cases illustrative of the general principle will be found in the next chapter (*o*).

Words of limitation used in one devise, not to be applied to a distinct devise.

"But," as Mr. Jarman points out (*p*), "it is not to be inferred from the preceding cases, that words may be inserted upon mere conjecture, in order to equalise estates created by several distinct and independent devises, in favour of persons with respect to whom the testator has expressed no uniformity of purpose, though it may reasonably be *conjectured* that he had the same intention as to all."

As illustrations of this principle Mr. Jarman cites numerous cases in which it had been decided, under the old law, that where a testator gave some of his lands to A with the words of limitation carrying the fee, and other lands to A or B without words of limitation, it could not be inferred that he meant the latter devise to carry the fee (*q*). And Mr. Jarman quotes from the case of

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(*g*) 33 Ch. D. 198. *Mellor* v. *Daintree* and *Re Redfern* were distinguished in *Crawford's Trustees* v. *Fleck*, [1910] S. C. 998.

(*h*) 62 L. T. 753.

(*i*) [1899] 1 Ir. R. 324.

(*k*) 74 L. T. 302.

(*l*) 54 W. R. 517. Compare *Munro* v. *Henderson*, [1908] 1 Ir. R. 260.

(*m*) [1913] 2 Ch. 9.

(*n*) *Wills* v. *Wills*, L. R. 20 Eq. 342; *Re Hutchinson's Trusts*, 21 Ch. D 811. But see *Swabey* v. *Goldie*, 1 Ch. D. 380.

(*o*) Chap. XIX.

(*p*) First ed. p. 432.

(*q*) *Spirt* v. *Bence*, Cro. Car. 368; *Right* d. *Mitchell* v. *Sidebotham*, Dougl. 759; *Paice* v. *Archbp. of Canterbury*, 14 Ves. 366; *Doe* d. *Child* v. *Wright*, 8 T. R. 64; see also 1 B. & P. N. R. 335; where the same construction was adopted by three of the Judges, with the reluctant concurrence of Sir James Mansfield. To these may be added *Hay* v. *Earl of Coventry*, 3 T. R. 83; *Doe* d. *Crutchfield* v. *Pearce*, 1 Pri. 353.

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Right d. *Compton* v. *Compton* (*r*) the following remarks of Lord Ellenborough: "That the exposition of every will must be founded on the whole instrument and made *ex antecedentibus et consequentibus*, is one of the most prominent canons of testamentary construction; yet, where between the parts there is no connexion by grammatical construction, or by some reference, express or implied, and where there is nothing in the will declarative of some common purpose, from which it may be inferred that the testator meant a similar disposition by such different parts, though he may have varied his phrase or expressed himself imperfectly, the Court cannot go into one part of the will to determine the meaning of another *perfect in itself*, and *without ambiguity*, and not militating with any other provision respecting the same subject-matter, notwithstanding that a more probable disposition for the testator to have made may be collected from such assisted construction. . . . From a testator having given persons in a certain degree of relationship to him a fee-simple in [part of] a certain farm, no conclusion, which can be relied upon, can be drawn, that his intention was to give to other persons, standing in the same rank of proximity, the same interest in another part of the same farm. Where the words of the two devises are different, the more natural conclusion is, that, as his expressions are varied, they were altered because his intention in both cases was not the same" (*s*).

Words not supplied in order to render uniform several devises of different parts of one farm, to persons in same relationship.

Gift of annuity not restricted by context.

A question involving the principle now under discussion arose in *Walker* v. *Tipping* (*t*), where, among several legacies of £300 each to the testator's grand-nephews, some of which were directed to be paid at particular ages, and others to be sunk in annuities for the lives of the respective legatees, there occurred two bequests as follows: "J. W., £300 annuity for life." "Martha—, £300, an annuity for life." Sir G. Turner, V.-C., held, that he could not read these bequests as if they were gifts of sums of £300 to be sunk in annuities for the lives of the legatees, but must understand them in their plain and obvious sense as giving annuities of £300.

The same principle is applicable to the objects of a devise.

(*r*) 9 East, 267. See also *Morris* v. *Lloyd*, 3 H. & C. 141. *Anon.*, Moo. 52. But it is said a devise thus, "I give Blackacre to C and his heirs, *and also* Whiteacre" (not repeating the devisee's name and the verb of gift), gives C the fee in Whiteacre: *per* Levinz, J., 1 Mod. 130.

(*s*) The principle here laid down was applied in *Re Patterson*, [1899] 1 Ir. R. 324.

(*t*) 9 Hare, 800. But it is difficult to overcome the impression that the bequests in question were elliptical.

Name of legatee not supplied by conjecture.

Thus, in *Clarke* v. *Clemmans* (*u*), where a testator bequeathed legacies to "my brother A," "my sister B," "the widow of my late brother C," and "the eight children of D," and gave the residue of his estate to X for life, and after her death, "in trust for the said A, B, and C, and the eight children of the said D," it was held by Sir R. Malins, V.C., that the testator never intended to give a share of the residue to C, for he had already referred to him as dead at the date of the will; it was clear, therefore, that he had made some mistake, and it was highly probable that he intended to have given the share to C's widow, but as his intention was not certain, the Court could not make the addition needed to effectuate it (*x*).

Still less can the words of a devise contained in a will be extended to modify the effect of an independent devise contained in a codicil (*y*).

Revoked words cannot be restored.

Mr. Jarman says (*z*): "It is to be collected from the case of *Holder* v. *Howell* (*a*) that where a testator in a codicil recites that an inconvenient consequence may result from a devise in his will, as that in a particular event the devisee or legatee would be unprovided for contrary to his intention, and then, instead of confining himself to simply effecting the declared purpose of the codicil, he proceeds to revoke the whole devise, giving the land again to the same trustees upon certain trusts which he particularises, and which are the same as the former trusts with the exception of the matter expressly intended for correction, *and of one other of the trusts, which he wholly omits*; this omission, though probably undesigned, cannot be supplied. The principle of this case seems to be inconsistent with, and it may, therefore, be considered as overruling, the earlier case of *Mathews* v. *Bowman* (*b*), where a testator, having devised the residue of his estate to his daughters as tenants in common, by a codicil made for a particular purpose re-devised it to them, omitting the words of severance, it was held, that the legatees were tenants in common."

(*u*) 36 L. J. Ch. 171. See also *Driver* v. *Driver*, 43 L. J. Ch. 279, *ante*, p. 561.

(*x*) Note, however, that the words "the said" confined the choice to those previously mentioned, that C was confessedly out of the question, that all the others were correctly re-named except C's widow and X (on whose death the disposition was to take effect), and that between these two there could scarcely exist a judicial doubt.

(*y*) *Biss* v. *Smith*, 2 H. & N. 105; *Grimson* v. *Downing*, 4 Drew. 132.

(*z*) First ed. p. 164.

(*a*) 8 Ves. 97; and see *Dashwood* v. *Peyton*, 18 Ves. 46; *Viscount Holmesdale* v. *West*, L. R. 3 Eq. 486, on app. (but this point not touched), L. R. 4 H. L. 543. See same case L. R. 12 Eq. 280.

(*b*) 3 Anst. 727, a reporter of very doubtful authority, and see *In b. Lewis*, 14 Jur. 514, 7 No. Cas. 436.

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Conversely, a codicil may have the effect of removing an ambiguity which appears on the face of the will (*c*).

How far operation of words enlarging or modifying gifts extends.

This seems to be a convenient place to consider those cases in which the question has arisen whether words at the beginning or end of a clause apply to the whole clause or only to the part which immediately follows or precedes them. Thus in *Doe* d. *Ellam* v. *Westley* (*d*), a testator gave several pecuniary legacies, prefacing each bequest with the word "Item," and made a specific devise, also commencing with the word "Item." He then proceeded as follows. "Item, I give and bequeath unto M. W. all that my messuage or dwelling-house wherein I now dwell, with the garden and all the appurtenances thereunto belonging; and I also give to the said M. W. all my household goods and chattels, and implements of household within doors and without, *all for her own disposing, free will, and pleasure*, immediately after my decease"; it was held, that the words in italics were confined to the last section of the clause, and consequently that the devisee took only an estate for life in the messuage. Again, in *Gower* v. *Towers* (*e*), a testator made two bequests to the same person in successive sentences, and in the latter added the words "for life"; it was held that they applied only to the second bequest. And in *De Windt* v. *De Windt* (*f*), where a testator devised his estates in N. to his nephew A for life, and after his death to his sons in tail lawfully begotten; and in the event of his or their death without sons lawfully begotten, the testator left the said estates to his cousin B, and after his death to his sons lawfully begotten, *beginning with the elder*. It was held that these four words applied to the latter limitation only, and not to the limitation to the sons of A, who consequently took as tenants in common.

Where whole disposition is affected.

But it may appear from the grammatical construction of the clause that the concluding words were intended to apply to the whole of it: as in *Child* v. *Elsworth* (*g*). And a similar result may follow from a consideration of the scheme of the whole will; as in *Gordon* v. *Gordon* (*h*) where the testator in effect devised his estate Blackacre and Whiteacre, as to Blackacre in trust for his son R and his issue, then for his son J and his issue; and as to Whiteacre in trust for J and his issue, then for R and his issue; and in default of issue of R and J in trust for the testator's

(*c*) *Re Venn*, [1904] 2 Ch. 52.
(*d*) 4 B. & Cr. 667.
(*e*) 26 Bea. 81.
(*f*) L. R. 1 H. L. 87.
(*g*) 2 D. M. & G. 679.
(*h*) L. R. 5 H. L. 254.

daughter : it was held that the devise over included Blackacre as well as Whiteacre, notwithstanding that each devise began with the words " as to " (*i*).

Effect, where clauses of will are numerically arranged.

And where a testator divides his will into sections, numerically arranged, and in some instances places the words of limitation at the end of each section, it seems that they will be considered as applicable to the several devises contained in that section, and not be confined to those in immediate juxtaposition. As, in *Fenny* d. *Collings* v. *Ewestace* (*k*), where a testator devised, " first," to his wife, all his household goods, etc., to her and her heirs for ever; also, he gave to his wife three cow commons, to her and her heirs for ever. " 2ndly," To his two nephews, J and T C, all that piece of land called P.; also, he gave to his nephews, J and T C, all that piece of land called L., to be equally divided between them as tenants in common, and to their several heirs and assigns for ever. " 3rdly," as follows : " I give unto my nephew J D all that my house and premises at P., in the occupation of R.; I also give unto my nephew J D all that my land in the parishes of P. and A., in the occupation of J T to him my said nephew J D, his heirs and assigns for ever." The question was, whether the words of limitation in the last devise applied to the lands in the occupation or R, or were confined to those immediately preceding, *i.e.*, in the occupation of J T; and it was held that they applied to both. Lord Ellenborough said, " If it had not been for the numerical arrangement, there might have been some difficulty, but that removes it. It seems clear, from the context, that both in the second and third clause, the testator, by reserving to the close of the entire sentence the words of limitation, meant to accumulate and comprehend within those words all that he had disposed of in the preceding parts of the sentence."

Gift to " the children of A and B."

In some cases a gift to the children of A and B has been held to mean the children of A and the children of B, while in others it has been held to be a gift to B and the children of A. These cases are considered in another place (*l*).

(*i*) Compare the case of *Willis* v. *Curtois*, 1 Bea. 189, where a testator gave to A his " carriages, horses, etc., and chattels in and about his house at M.; *and also* his household goods and furniture, pictures, plate, etc., and likewise his watches and personal ornaments "; Lord Langdale, M.R., held that A was entitled to all the testator's household goods, etc., and not those only which were at his house at M. As to the force of the word " item," or " also," see *Hopewell* v. *Ackland*, 1 Salk. 239 : of the word " likewise," *Paylor* v. *Pegg*, 24 Bea. 105.

(*k*) 4 M. & Sel. 58; see also *Child* v. *Elsworth*, 2 D. M. & G. 679.

(*l*) *Post*, p. 1687.

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Words may be transposed, when.

II.—As to the Transposition of Words and Clauses.—"It is quite clear," says Mr. Jarman (*m*), "that, where a clause or expression, otherwise senseless and contradictory, can be rendered consistent with the context by being (*n*) transposed, the Courts are warranted in making that transposition."

Instances of transposition.

Thus, where (*o*) A devised all that his messuage, dwelling-house, or tenement, with all lands, hereditaments, and appurtenances thereto belonging, situate in Blythbury, in the parish of M.R., "now in the occupation of" T W, except one meadow, called Floodgate Meadow; and it appeared that T W was in possession of the messuage, and a small part only of the lands in Blythbury, and not of Floodgate Meadow; it was held, that the words "now in the occupation of" T W might be transposed and applied to the dwelling-house, according to the fact, which would render the whole consistent; whereas, without this transposition, the exception of Floodgate Meadow was senseless and nugatory, as it had never been in the occupation of T W. The effect consequently was, that the devise extended to all the lands in Blythbury, except Floodgate Meadow, whether in the occupation of T W or not.

Words transposed in compliance with context.

So, where (*p*) the devise was in the following words: "I devise all my hereditaments in Standon unto my sister Elizabeth Thorley and to her daughters Ann Shaw and Frances Thorley, their heirs and assigns, equally to be divided between and amongst them, share and share alike, as tenants in common, and not as joint tenants, for and during the life of my said sister Elizabeth Thorley; and from and immediately after her decease, then I devise the said third part of the aforesaid hereditaments so devised to my said sister for life as aforesaid, unto her said two daughters Ann Shaw and Frances Thorley, their heirs and assigns for ever, equally to be divided between them, share and share alike, as tenants in common, and not as joint tenants." It was contended, that under this devise the daughters of the testator's sister took estates *pur auter vie* for the life of their mother concurrently with her as tenants in common; and as to one-third with remainder in fee to the daughters, leaving the reversion in fee in the other two-thirds undisposed of; but it was held, that the daughters took estates in fee in the entirety expectant on the decease of their mother. Lord Ellenborough said,

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(*m*) First edition, p. 437.

(*n*) See *Green* v. *Hayman*, 2 Ch. Cas. 10; *Spark* v. *Purnell*, Hob. 75; *Cole* v. *Rawlinson*, 1 Salk. 234; *East* v. *Cook*, 2 Ves. Sen. 30; *Duke of Marlborough* v. *Lord Godolphin*, *ib.* 74; *Blamire* v. *Geldart*, 16 Ves. 314; *Gibson* v. *Lord Montfort*, 1 Ves. sen. 491; *Mohun* v. *Mohun*, 1 Sw. 201.

(*o*) *Marshall* v. *Hopkins*, 15 East, 309.

(*p*) *Doe* d. *Wolfe* v. *Allcock*, 1 B. & Ald. 137.

"The testator has thrown together a heap of words, the sense and meaning of which he did not clearly apprehend; but although the language of this will is confused, and the words are scattered in such a way, as, if taken in the order in which they stand, they do not convey any meaning; yet, in favour of common sense, we may take the liberty of transposing them, according to that order which we may fairly suppose the testator would wish to have adopted, and by which we can best effectuate his intention. The labour of the argument has been, to make the testator dispose of only one-third of his estate, and thereby to compel an intestacy as to the remainder; whereas, his meaning evidently was to dispose of the whole."

Observations upon *Doe* v. *Allcock*.

Speaking of the conclusion thus arrived at, Mr. Jarman remarks (*q*): "That the construction adopted by the Court accorded with the intention of the testator is highly probable; and if, as Lord Ellenborough suggested, the words taken in the order in which they stood did not convey *any* meaning, the established rules of construction clearly authorised the transposition. But the difficulty was in saying that the words *were* unmeaning in their actual order; for it is submitted, that the will, read in that order, contained a clear and express devise to the three devisees for the life of the mother, remainder as to one-third to the two daughters in fee; and had the testator deliberately intended to confine his dispositions to those estates, he could hardly have expressed himself in more technical or formal language. The construction indeed was apparently absurd, but let it be remembered that the absurdity of a disposition, if unequivocally expressed, is no objection to its receiving a literal interpretation (*r*). However, the case was *professedly* decided upon the principle before laid down, and may, therefore, properly be treated as an authority in favour of that principle" (*s*).

In *Key* v. *Key* (*t*) a testator devised an estate to S K for life charged with certain annuities, but in case the annuitants, or any one of them, survived S K he gave the estate to S K's eldest surviving son, charged with the annuities, and in default of issue male, then over; it was held that as a literal adherence to the words of the will would have defeated the manifest intention of the testator by making the devise to S K's son dependent on his surviving some of the annuitants, the will ought to be construed

(*q*) First edition, p. 439.

(*r*) *Mason* v. *Robinson*, 2 S. & St. 295.

(*s*) But Holroyd, J., while concurring in the decision, rested his judgment on the ground that the words "equally to be divided" down to "Elizabeth Thorley," might be read as in a parenthesis, and so made to refer only to the mode of enjoyment during the life of E. Thorley, without affecting the quantity of estate to be taken by the devisees.

(*t*) 4 D. M. & G. 73. See also *Surtees* v. *Hopkinson*, L. R. 4 Eq. 98.

as meaning that the son was to take subject to the annuities in case the annuitants were then living.

Transposition of the subject of devise.

"Another case of transposition sometimes occurs," Mr. Jarman continues (*u*), "where a testator has devised lands at A to B, and lands at C to D, and it appears by the fact of the limitations of each devise being exactly applicable to the testator's estate in the lands comprised in the other, and other circumstances, that he has, in each instance, placed the devised estate in the position intended to have been occupied by the other.

Mosley v. *Massey.*

"As where (*x*) J H, having an estate in the county of Monmouth, of which he was seised in fee to his own use, and another estate in the county of Radnor, of which he was also seised in fee subject to the trusts of his marriage settlement (by which he had covenanted to convey the lands to the use of himself, remainder to his wife for life, remainder to his first and other sons in tail); both which estates had formerly belonged to an uncle, and came to him, one by descent, the other by purchase from another co-heir of his uncle, by his will, reciting that he was seised in fee of a messuage and lands at L., in the county of *Radnor*, and of a moiety of a messuage in the parish of O. R., in the county of *Radnor*, and that he was also seised of the reversion in fee expectant on the death of his wife, and of his son without issue, of lands in the counties of *Monmouth* and *Northumberland*, (whereas the settled lands were in Radnorshire, and those in Monmouthshire and Northumberland were absolutely his own), devised his said estate in the said county of *Radnor* to his wife for life, remainder to his only son for life, remainder to his (the son's) sons and daughters in tail, in strict settlement, remainder to his own daughter, etc., and devised the reversion of his said estates in the said county of Monmouth, *after the deaths of his wife and only son without issue*, to his daughter, etc. The will moreover referred to the lands devised as part of the estate of his late uncle. It was held that, comparing the devising clause with the recital and the facts, sufficient appeared to ascertain, beyond a possiblity of doubt, that the devisor had made a mistake in the local description, and that his intent was to pass the present interest of his estate in fee in possession, which was in the county of Monmouth, and the reversion of his settled estate in the county of Radnor, although he had respectively misdescribed their local situations."

It seems therefore that, although the words as they stand are not absolutely senseless or contradictory, transposition will be

(*u*) First edition, p. 440.

(*x*) *Mosley* v. *Massey*, 8 East, 149. Compare *Doe* d. *Chevalier* v. *Huthwaite*, 8 Taunt. 306; 3 B. & Ald. 632.

Transposition of words to fit the general intent.

Eden v. *Wilson.*

made if it be required to effectuate an intention clearly expressed or indicated by the context. *Eden* v. *Wilson* (*y*) is an instructive example of this doctrine. A testator devised his estates to his daughter for life, remainder to her first son R for life, remainder to his first and other sons successively in tail, remainder to her second son J for life, with like remainder to his sons in tail, with remainders to the daughter's third, fourth and other sons in tail; and with a proviso shifting the estate from any son who might become entitled to the D estates under the will of the late D (by which those estates were entailed on the second and younger sons); "provided always that if my said daughter shall have no issue male of her body living at her death, or no such issue male as shall be entitled, by the true meaning of this my will, to my real estates hereby limited, then and in either of those cases, I devise the said real estates to all the daughters of the body of my said daughter living at her death as tenants in common and their heirs respectively, with cross remainders amongst them in case of any one or more of them happening to die under twenty-one and without issue, and if there should be but one such daughter living at my said daughter's decease and no issue of any other daughter then in being, then to such only surviving daughter and her heirs, but if any such daughter shall die in her said mother's lifetime leaving issue" such issue to take their parents' share, "and in case my said daughter shall have no issue of her body living at her death," then over. At the death of the testator's daughter her two sons R and J were living, besides several daughters; but both sons afterwards died without issue, and it was contended that the second of the two cases "in either of" which the limitation to the daughters was to take effect had thus happened: but it was held in the House of Lords, upon the whole proviso, that the estates limited by it were not designed as a mere continuation of the previous limitations (to which they did not fit on), but were intended to take effect, if at all, at the daughter's death in favour of persons then living, and that to effect this the words "living at her death" in the introductory passage must be read in connection with the verb "have," not with the words "issue male of her body," and so made to run through both branches of the proviso. In other words, the expression "living at her death" was transposed and read as if it came immediately after the verb "have." It was not, however, a limitation cutting down the previous devise, but a remainder contingent on the determination of that devise in a particular manner.

(*y*) 4 H. L. C. 257; *S.C. Wilson* v. *Eden*, 1 Ex. 772; 14 Q. B. 256.

CHAP. XVIII.

Transposition of name.

Mr. Jarman continues (*z*): "The same principle, too, is applicable to the *objects* of a devise; for it has been held, that, where (*a*) a testatrix, having two nieces, Mary who had never been married, and Ann who had been married and was dead leaving two children, bequeathed one moiety in a certain portion of her property to *the children* of her niece *Mary*, and the other moiety to her niece *Ann*; it being evident that the bequest to the children of Mary was intended for the children of Ann, and that to Ann for Mary, the Court corrected the mistake."

As to changing words.

III.—As to changing Words.—"To alter the language of a testator," as Mr. Jarman points out (*b*), "is evidently a strong measure, and one which, in general, is to be justified only by a clear explanatory context. It often happens, however, that the misuse of some word or phrase is so palpable on the face of the will, as that no difficulty occurs in pronouncing the testator to have employed an expression which does not accurately convey his meaning. But this is not enough: it must be apparent, not only that he has used the wrong word or phrase, but also what is the right one (*c*); and, if this be clear, the alteration of language is warranted by the established principles of construction (*d*). The recent and much discussed case of *Doe* v. *Gallini* (*e*) affords an apposite example of such a correction of phrase. The testator, after devising estates for life to his children, and, in case of the death of any of them, to their respective children living at their decease, for life, proceeded thus: 'And from and after the decease of all the children of *each* of my said sons and daughters *without* issue, I give and devise the estate or estates to them respectively limited as aforesaid, unto and among all and every the *lawful issue* of such child or children during their lives as tenants in common, and to descend in like manner to the issue of my said sons and daughters respectively, so long as there shall be any stock or offspring remaining.' It was contended that the word 'all' was to be changed into 'any,' and the words 'without issue' to read 'leaving issue,' in order to render the language of the will sensible and consistent with the context; and the Court did not hesitate in adopting this construction, though the point was not the main subject of discussion in the case."

Words "without issue" read *leaving* issue.

(*z*) First ed. p. 441.

(*a*) *Bradwin* v. *Harpur*, Amb. 374.

(*b*) First. ed. p. 441.

(*c*) *Taylor* v. *Richardson*, 2 Drew. 16.

(*d*) It will, of course, be remembered that the Court of Probate has no power to change the wording of a will: *ante*, p. 32.

(*e*) 5 B. & Ad. 621, 3 Ad. & Ell. 340, 2 Nev. & M. 619, 4 Nev. & M. 894. And see *Jarman* v. *Vye*, L. R. 2 Eq. 784 ("all" admitted to mean "any").

"Fourth" read "fifth."

So, in *Hart* v. *Tulk* (*f*), where a testator's general intention appeared by the will to be to make an equal distribution of his property (which he described in seven different schedules), amongst his seven children; and he subjected the properties comprised in the seven schedules to mortgage debts in such a manner, that, if in a particular clause, the words "fourth schedule" was read literally, not only would the entire plan of the will, as indicated above, be frustrated, but the payment of the debts in the manner provided by the will would become impossible; Sir J. K. Bruce and Lord Cranworth, L.JJ., held that they were warranted in reading the word "fourth" as meaning "fifth," which the context showed was the change required to render the will consistent.

"L K" read "C."

Again, in *Re Northen's Estate* (*g*) the will was read as if the words "the said C estate" were inserted in the place of the words "the said L K estate."

Referential gifts.

A somewhat similar principle is often applied in construing referential gifts, where a literal adherence to the original gift would defeat the manifest intention of the testator (*h*).

"Or" read "of."

In *Re Dayrell* (*i*) the expression "son or any person" was read as "son of any person."

"One" read "no."

In *Moore* v. *Beagley* (*k*) "one" was read "no."

Parol evidence.

Several cases in which the Court has refused to admit parol evidence to correct alleged mistakes in names of persons and places, are referred to in other chapters (*l*).

"Several" used in sense of *respective*.

"The changing of words, however," as Mr. Jarman points out (*m*), "has most frequently occurred in regard to expressions, which, in common parlance, are often used inaccurately; as the word 'severally' for 'respectively,' of which we have an instance in *Woodstock* v. *Shillito* (*n*), where a testator gave the interest of a fund to his wife for life, and after her death to such of his four daughters as should be then living, in equal shares, during their respective lives; and from and after the *several* deceases of his

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(*f*) 2 D. M. & G. 300; and see *Philipps* v. *Chamberlaine*, 4 Ves. 51; *Dent* v. *Pepys*, 6 Mad. 350; *Bengough* v. *Edridge*, 1 Sim. 173; *Berkeley* v. *Palling*, 1 Russ. 496 (where "seven" was changed into "eight"); *Pasmore* v. *Huggins*, 21 Bea. 103 (where "future" might, it seems, have been read "former"); *Re Bayliss's Trust*, 17 Sim. 178 (where "are" was interpreted in a future sense); *Taylor* v. *Creagh*, 8 Ir. Ch. Rep. 281 (£400 read £500); compare *Thompson* v. *Whitelock*, 5 Jur. (N.S.) 991.

(*g*) 28 Ch. D. 153.

(*h*) See *Parker* v. *Tootal*, 11 H. L. C. 143; *Re Hutchinson*, 55 L. J. Ch. 574; *Surtees* v. *Hopkinson*, L. R. 4 Eq. 98, and other cases referred to in Chap. XX, *post*, p. 667.

(*i*) [1904] 2 Ch. 496.

(*k*) 33 L. T. 198.

(*l*) Chaps. XV, pp. 502 *seq.*; XXXV, pp. 1223 *seq.*

(*m*) First ed. p. 442.

(*n*) 6 Sim. 416.

four daughters, he gave one-fourth of the capital to their respective children. One of the daughters died before the widow, leaving a child. The surviving daughters claimed to be entitled to the entire fund, under the express gift to the daughters living at the decease of the testator's widow; but Sir L. Shadwell, V.-C., held, that the words 'from and after the several deceases of my said daughters,' were to be construed 'from and after the decease of my daughters *respectively*.' 'It was clear,' he said, 'the testator meant to give to the children the share of their mother on her death.'

"Or" changed into "and."

"But by far the most numerous class of cases, exhibiting the *change* of a testator's words, are those in which the disjunctive 'or' has been changed into the copulative '*and*' and *vice versa*. It is obvious that these words are often used orally without a due regard to their respective import; and it would not be difficult to adduce instances of the inaccuracy, even in written compositions of some note; it is not surprising, therefore, that this inaccuracy should have found its way into wills. Accordingly we find that the Courts have often been called upon to rectify blunders of this nature: so often, indeed, as to have swelled the cases on the subject into a mass requiring much attention and discriminative arrangement, in order to deduce from them any intelligible and consistent principles; and, in performing this task, the liberty must be taken of sometimes referring the cases to principles not distinctly recognised by the judges who decided them.

In case of devise over, in event of death under twenty-one *or* without issue.

"It has been long settled that a devise of real estate to A and his heirs, or, which would be the same in effect, to A indefinitely, and in case of his death under twenty-one, *or* without issue, over, the word 'or' is construed 'and,' and, consequently, the estate does not go over to the ulterior devisee, unless both the specified events happen.

"One of the earliest authorities for this construction is the case of *Soulle* v. *Gerrard* (*o*); where a testator, having four sons, devised lands to Richard, one of his sons, and his heirs for ever; and if Richard died within the age of one-and-twenty years, *or* without issue, then, that the land should remain to his other three sons. Richard died under age, leaving issue a daughter. It was held, that in the event which had happened, the devise over to the

(*o*) Cro. El. 525; *S.C. nom. Sowell* v. *Garrett*, Moore, 422, pl. 590; *Price* v. *Hunt*, Pollex. 645; *Barker* v. *Suretees*, 2 Str. 1175; *Walsh* v. *Peterson*, 3 Atk. 193; *Doe* d. *Burnsall* v. *Davy*, 6 T. L. 30; *Fairfield* v. *Morgan*, 2 B. & P. N. R. 38; *Eastman* v. *Baker*, 1 Taunt. 174; *Right* v. *Day*, 16 East, 67; *Morris* v. *Morris*, 17 Bea. 198. See also *Doe* d. *Herbert* v. *Selby*, 4 D. & Ry. 608; 2 B. & Cr. 926; *Morrall* v. *Sutton*, 1 Phill. 533.

three sons had failed; for, that by the words and intent, it was not to commence unless *both* parts were performed, and that it was 'all one as if the disjunctive *or* had been a copulative.'

Principle of the rule;

"The ground for changing the testator's expression in these cases is, that as, by making the event of the devisee leaving issue a condition of his retaining the estate, he evidently intends that a benefit shall accrue to such issue through their parent, it is highly improbable that he should mean this benefit to depend upon the contingency of the devisee attaining majority; while, on the other hand, it is very probable that the testator should intend, in the event of the devisee dying under age leaving issue, to give him an estate which would devolve upon the issue; but that, if he attained twenty-one (the age at which he would acquire a disposing competency), he should take the estate absolutely, *i.e.*, whether he afterwards died leaving issue or not. The change of *or* into *and*, therefore substitutes a reasonable for a most unreasonable scheme of disposition.

—applicable to bequests of personalty.

"And though it has generally happened that the subject to which this rule of construction has been applied is real estate, yet the rule is equally applicable (as the reason of it evidently is) to bequests of personalty; and, therefore, in the case of a legacy to A, and in case of his death under age *or* without issue, to B, it is not to be doubted that A would retain the legacy, unless he died under age *and* without leaving issue at his decease (*p*).

"And, of course, it would be immaterial that the original bequest was expressly made contingent on the legatee attaining majority. As in *Mytton* v. *Boodle* (*q*), where a testator bequeathed £5,000 to A if he attained twenty-one; but if he should not attain that age, *or* die without leaving issue, then over. It was held, that A, on attaining twenty-one, was absolutely entitled.

"In this case (*r*) the expression which raised the question in the will was repeated in the codicil—a circumstance which was considered (and it is conceived rightly) not to indicate that it was used advisedly.

Gift over in case of death during minority unmarried *or* without issue.

"And the same construction obtains where another event is associated with the dying under age and without issue, as in the case of a bequest to A, with a gift over in case of his dying during minority *unmarried*, *or* without issue (*s*); and that, too, though the copulative 'and' is found in company with the disjunctive

(*p*) *Wright* v. *Marsom*, [1895] W. N. 148.
(*q*) 6 Sim. 457.
(*r*) And in *Framlingham* v. *Brand*, *infra*.
(*s*) *Framlingham* v. *Brand*, 3 Atk. 390; see *Doe* v. *Cooke*, 7 East, 269, *post*; *Re Clegg*, 14 Ir. Ch. 70 (gift over in the event of legatee dying under age or unmarried); *Re Cantillon*, 16 Ir. Ch. 301.

'or' in the same will, indeed, in this very sentence. As in *Miles* v. *Dyer* (*t*), where the bequest was to A for life, and after her decease to her children on their attaining twenty-one; and in case they should die in the lifetime of A, *or* under twenty-one, *and* without leaving issue, then over, it was held that the interests of the children were not divested unless the three events happened.

"It is obvious that the ground for changing *or* into *and* exists *a fortiori* where children or issue are the express objects of the prior gift; as where (*u*) there is a devise to a person when he attains twenty-one, for life, remainder to his children (the devise, in the case referred to, was to the sons successively and the daughters concurrently), in tail, with a devise over if he die *under twenty-one* OR *without children.*

Suggested extension of the rule.

"It would seem that the principle in question applies to every case where the gift over is to arise in the event of the preceding devisee or legatee dying under prescribed circumstances, *or* leaving an object who would, or, at least, who *might* take a benefit derivatively through the devisee or legatee, if his interest remained undivested, and to whom, therefore, it is probable the testator intended indirectly a benefit, not dependent upon the circumstance of the devisee or legatee dying under the prescribed circumstances or not. In this point of view it would seem to be immaterial whether the dying is confined to minority, or is associated with any other contingency, as in the case of a gift to A, and if he shall die *in the lifetime of B* OR *without issue* (*x*) [or die *without issue* OR *intestate* (*y*)], then over; or whether the event is leaving issue or leaving any other object who would derive an interest or benefit through the legatee, if his or her interest was held to be absolute, as a husband or wife.

Gift over on death under twenty-one, *or* without leaving a husband.

"Thus, where (*z*) a testator bequeathed the residue of his personal estate to his daughter, her executors, etc., with a proviso, that in case his daughter happened to die under twenty-one, *or without leaving any husband* living at her death, then he gave several legacies, all which he directed to be paid

(*t*) 5 Sim. 435; 8 Sim. 330.

(*u*) *Hasker* v. *Sutton*, 9 J. B. Moo. 2; 1 Bing. 500. [But the only question there was whether the remainder was vested or not. The defendants could not succeed unless it was, and it could be so only by adopting Lord Hardwicke's "construction" in *Brownsword* v. *Edwards* (*post*, pp. 579 *seq.*): reading *or* as *and* was insufficient: and the Court certified against them. And see now *Cooke* v. *Mirehouse*, 34 Bea. 27, *post*, p. 583.]

(*x*) *Wright* v. *Kemp*, 3 T. R. 470, a case on a transaction *inter vivos*; *Denn* d. *Wilkins* v. *Kemeys*, 9 East, 366; *Doe* d. *Knight* v. *Chaffey*, 16 M. & Wels. 656.

(*y*) [*Green* v. *Harvey*, 1 Hare, 428; *Beachcroft* v. *Broome*, 4 T. R. 441; and see *Incorporated Society* v. *Richards*, 1 D. & War. 283; *Greated* v. *Greated*, 26 Bea. 621; *Stretton* v. *Fitzgerald*, 23 L. R. Ir. 466.]

(*z*) *Weddell* v. *Mundy*, 6 Ves. 341.

within twelve calendar months after his decease, *in case of the death of his daughter under age as aforesaid*; and in such case he gave the residue to other persons—Sir W. Grant, M.R., held, that 'or' was to be read 'and,' and that the expression 'under age *as aforesaid*' meant not leaving a husband.

"The cases under consideration, perhaps, may seem to form an exception to the rule that words, unambiguous in themselves, are not to be rejected or changed on account of their unreasonableness; but as this construction has obtained so long, is confined to a particular expression, and that expression one which is often used indiscriminately with the substituted word, there does not seem to be much danger in this seeming latitude of interpretation; but it should, if possible, be made to rest upon some solid principle, fixing definite limits to its application. The cases, it is conceived, in effect though not professedly, warrant us in stating that principle to be (as before suggested), that where the dying under twenty-one is associated with the event of the devisee leaving an object, who would, if the devisee retained the estate, take an interest derivatively through him, the copulative construction prevails, though it is by no means equally clear that the rule is *confined* to such cases."

Whether rule applies to estates tail.

Lord Hardwicke, in *Brownsword* v. *Edwards* (*a*), expressed an opinion, that the construction in question was not applicable to estates tail, on the ground that there was no occasion for it; since an estate tail was capable of a remainder, and the words might, by an "easy construction," be read as such; *so as to secure the estate to the issue, if any, and yet give effect to the remainder in case the issue failed at any time.* At the present day the Court follows Lord Hardwicke in declining to change "*or*" into "*and*" (or the contrary) where the prior estate is in tail, but rejects the "construction" upon which alone his opinion was based. The course of decision deserves attention. In some of the cases, it will be seen, the gift over was if the tenants in tail should die under twenty-one *or* without issue, in others the conjunction "and" was used.

Brownsword v. *Edwards.*

In *Brownsword* v. *Edwards* (*b*), the devise was to trustees and their heirs to receive the rents until A should attain twenty-one; and if he should live to attain twenty-one or have issue then to A and the heirs of his body; but if A should die before twenty-one *and* without issue, then in trust for B in like manner, with gifts over in the like words to other branches of testator's family;

(*a*) 2 Ves. Sen. 243. The observations on *Brownsword* v. *Edwards*, *Mortimer* v. *Hartley*, *Grey* v. *Pearson*, and other cases contained in the following seven paragraphs, are taken from the fourth edition of this work by Mr. Vincent.

(*b*) 2 Ves. Sen. 243.

and for want of such issue to his own right heirs. A and B were the testator's illegitimate son and daughter, but for the purposes of the argument were taken to be legitimate. A attained twenty-one and died without issue, and it was argued that the gift to B had failed, only one of the two events upon which it was limited having happened. But Lord Hardwicke held B to be entitled. He said: "There is no necessity in this case to transpose or supply material words; but there is a plain natural construction upon these words, *viz.*, if A shall happen to die before twenty-one, and also shall happen to die without issue; which construction plainly makes the dying without issue *to go through the whole* and fully answers the intent, which was in that manner. Had the first devise been to A and his heirs this construction I believe could not be made; for where there is such a contingent limitation I do not know that the Court has changed heirs into heirs of the body to make it so throughout. But much stronger constructions than this have been made in devises: as, in a devise to one and his heirs, and if he should die before twenty-one *or* without issue, the Court has said it was not the intent to disinherit the issue, and therefore *or* shall be construed *and*; but if the first limitation had been in tail there would be no occasion to resort to that, but the Court would make the construction I do now" (showing that, whether the word of the will was *and* or *or*, he thought some "construction" equally necessary), "*viz.*, if he dies without issue before twenty-one then over by way of executory devise; if he dies without issue after twenty-one, when the estate had vested in him, it would go by way of remainder: an estate tail is capable of a remainder, and it is natural to expect a remainder after it. It is contrary to his intent to let in this remainder to the right heirs to defeat all the intermediate limitations to his family."

Woodward v. *Glasbrook.*

Devise over if devisee in tail should die under twenty-one *or* unmarried.

A stricter adherence to the letter was preserved in the earlier case of *Woodward* v. *Glasbrook* (*c*), where a testator devised a house to his sons, James and Thomas, and the heirs of their bodies, in equal moieties, and devised other houses to his other children in like manner; and provided, that if any of his said children should die under twenty-one *or* unmarried (*d*), the part or share of him or her so dying should go to the survivors; and it was held by Holt, C.J., that the shares of two of the children dying unmarried, though they attained twenty-one, went to the devisees over.

(*c*) 2 Vern. 388.

(*d*) Not "without issue." But "unmarried" equally involves the extinction of the estate tail.

Doe v. *Jessep.*

"And" not changed into "or" in limitation over after an estate tail.

In *Doe* d. *Usher* v. *Jessep* (*e*), where A devised to trustees and their heirs, in trust for his natural son J and the heirs of his body, and if J should die before he attained his age of twenty-one years, *and* without issue, then over. J attained his majority but died without issue. It was contended, on a mistaken view of *Brownsword* v. *Edwards*, that "and" was to be read *or*, which would, in the event that had happened, give effect to the devise over; but Lord Ellenborough, though he admitted the cases to be very similar (the only distinction being that the limitation over in the cited case was in favour of a daughter, who, without such a construction as was there put upon the word "and," would have been without a provision, which is a distinction without a difference (*f*)), decided that the word was to be taken in its literal sense.

Mortimer v. *Hartley.*

Again, in *Mortimer* v. *Hartley* (*g*), where the testator devised lands to John and Ann successively in tail (*h*), and "if it should please God to take away both Ann and John under age, *or* without leaving lawful issue, then over to X. Ann died under age and without issue, and John died without issue, but not under age. On a case from Chancery the Court of Exchequer refused to read "or" as "and," and held that the devise over took effect. Parke, B., in delivering the judgment of the Court, said, "If we abide by the words of the will, it is possible we may disappoint what we may conjecture to have been one intention of the testator, because it is a reasonable intention to entertain, that is, to give a benefit to the issue if their parents should die under age, but we are sure of carrying into effect a manifest and declared intention of the testator to give the remainder over to X. on the determination of the estate tail: on the other hand, if we change 'or' into 'and' for the purpose of effecting the conjectured intention to give a benefit to the issue on the death of their parents respectively under age, we defeat the clear and manifest intention to give the remainder to X. on failure of the issue of John and Ann, and cause an intestacy as to that remainder, a circumstance which ought to be avoided." If the first devise had been in fee simple he admitted the authorities would have required the change; "but as none of the authorities apply to an estate tail and we have Lord Hardwicke's high authority for distinguishing such a case, we think we ought to do so, and abide by the ordinary sense of the words. *If any*

(*e*) 12 East, 288; see also *Soulle* v. *Gerrard*, Cro. El. 525 (stated *ante*, p. 576), where it was considered (though, according to subsequent authorities erroneously), that the first devisee had an estate tail.

(*f*) 6 H. L. C. 84, 85, 96.

(*g*) 6 Exch. 47, 3 De G. & S. 316.

(*h*) The Court of C. B. held upon the same will that the prior devise gave a fee, and then they read "or" as "and," 6 C. B. 819.

change should be made, the one which would be most likely to effectuate the intent of the testator would be to read the words as if they had been ' if it should please God to take away both John and Ann under age *or at any time* without issue.' By so reading them the issue would take if their parents died under age and X. succeed on the determination of the estate tail. But *if this cannot be done* we think we should make no change at all."

But this was exactly the change which the Court had " Lord Hardwicke's high authority " to make. Whether it was made or not, the result, as it happened, was the same; for in either case the gift over took effect without disappointing any issue. But if there had been any issue they would have been disappointed, and it seems strange to invoke Lord Hardwicke's authority for a conclusion which it was the declared object of his construction to avoid. When the case came back to Chancery, Sir K. Bruce, V.-C., virtually adopted that construction, saying, " On the authority of *Brownsword* v. *Edwards* and *Murray* v. *Jones* (*i*) and other cases, I am of opinion that the testator has but inaccurately expressed that he disposed of everything after the failure of the limitations contained in the prior clauses, in whatever manner they might fail."

Grey v. *Pearson.*

It is evident, however, that this construction strikes out the words " under twenty-one "; and in *Grey* v. *Pearson* (*k*), where the will was undistinguishable from the will in *Doe* v. *Jessep*, the devisee in tail attained twenty-one, but afterwards died without issue; and it was held in D. P., following *Doe* v. *Jessep*, that the words must be taken literally, and that the gift over failed. It was admitted that where lands were devised to one *and his heirs* with a gift over if he died under twenty-one *or* without issue, " or " was to be read " and "; it was too late to question the authorities which had so decided : but, it was said, those decisions did not govern a case where the first devise was in tail, with a gift over if the devisee died under age *and* without issue. The House refused therefore to apply those authorities to the case before it; and on the ground that Lord Hardwicke's " construction " had not been uniformly adopted it rejected that also, deeming it to be somewhat forced and very unusual (*l*).

Modern authority, therefore, while it still distinguishes the case of an estate tail, deals with it on wholly different principles

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(*i*) 2 V. & B. 313, stated *post*, p. 2132.

(*k*) 6 H. L. C. 61, by Lords Cranworth and Wensleydale, *diss.* Lord St. Leonards.

(*l*) Lord St. Leonards, on the other hand, thought it " easy and natural." As to *Doe* v. *Jessep*, he said it was hastily decided, and that the Judges of K. B. showed by their remarks that they misunderstood the real nature of the case, 6 H. L. C. 97.

from those upon which the distinction was originally based. For (as we have seen) Lord Hardwicke never meant to read the words so as in any event to disappoint the issue; whereas *Mortimer* v. *Hartley* and *Grey* v. *Pearson* will require both " or " and " and " to be strictly construed although the issue may be thereby disappointed. The readiness with which Lords Cranworth and Wensleydale accepted the distinction of an estate tail, while rejecting the grounds for it, was plainly due to their disapprobation of the so-called speculative system of construction adopted in the old authorities; and since *Grey* v. *Pearson* " or " has been strictly construed even in the case (already mentioned as furnishing an *a fortiori* argument for changing " or " into " and ") where children or issue were express objects of the prior gift: as, where (*m*) the devise was to A for life if he should attain thirty-one, with remainder to his eldest son in fee, with a gift over if A should die under thirty-one *or* not have a son. A attained thirty-one but died without having a son, and it was held that the gift over took effect, for that " or " could not be construed " and." Sir J. Romilly, M.R., said he never knew of a case where the change had been made for the purpose of defeating the will and creating an intestacy. It will, however, be perceived that if A had had a son and afterwards died under thirty-one the son would have been disappointed: for the construction could not properly depend on the event. The literal construction, however, has not yet been tested by any case where such disappointment would have ensued.

Cooke v. *Mirehouse.*

Of changing " and " into " or " in cases where the previous estate is not in tail, more will be said hereafter (*n*).

Gift in either of two events, with gift over on non-happening of one *or* the other.

To return to the cases in which " or " has been construed " and." " The argument for this construction," says Mr. Jarman (*o*), " is of course very strong where the effect of an adherence to the words of the will would be to deprive the legatee of what was previously given to him in *either* of two alternative events, unless both events should happen, as in the case of a bequest to A on his attaining thirty-one *or* marrying; and in case he should die under thirty-one *or* unmarried, then over; in such a case ' or ' is necessarily construed *and*, in order to make the limitation over consistent with the terms of the prior gift " (*p*). So where property was given to a person in either of two events,

(*m*) *Cooke* v. *Mirehouse*, 34 Bea. 27. As to *Hasker* v. *Sutton*, 9 J. B. Moo. 2, 1 Bing. 500, *vide ante*, p. 578, n. (*u*).

(*n*) *Post*, p. 588.

(*o*) First ed. p. 450.

(*p*) *Grant* v. *Dyer*, 2 Dow. 87; *Thompson* v. *Teulon*, 22 L. J. Ch. 243; *Collett* v. *Collett*, 35 Bea. 312, cited *post*, p. 1460. Compare *Re Clegg*, 14 Ir. Ch. 70; *Re Cantillon*, 16 Ir. Ch. 301.

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and afterwards given over unless not only those two events, but an additional event also happened, Shadwell, V.-C., thought that, if it were necessary, the Court would read the word "or" as "and" (*q*).

Where there is no prior gift.

These decisions depended on the inconsistency which, upon a literal construction, would have existed between the prior gifts and the executory gifts over. Where there is no prior gift this ground fails: so that a bequest to A after the death of testator's mother, or the second marriage, death, or forfeiture of his wife, although the testator had made life-provisions for both his mother and wife, upon whose death therefore a certain amount of the estate would be set free, was held to take effect immediately on the death of the mother without waiting for the second marriage, death, or forfeiture of the wife; in other words, the Court refused to read "or" as "and" (*r*). And a similar observation must be made with reference to the opposite change of "and" into "or" (*s*).

"Or" read "and" on general context.

Sometimes the general context or plan of the will calls for the conjunctive construction in cases not easily reducible to any specific head. Thus, in *Long* v. *Dennis* (*t*), where there was a devise to A for life, upon condition that if he should marry with any woman not having a competent fortune, or without the consent of trustees, the estate should not vest; the Court of K. B., considering that the testator meant to require the sanction of the trustees only in case A married a woman without a competent fortune, and also that conditions in restraint of marriage were odious, held that the estate vested upon performance of either part of the condition; that is to say, they read the word "or" as "and." And in another case (*u*), where a testator bequeathed the produce of real estate, after the cesser of certain life-estates, to J A for life, and after his death to his eldest son for life, "and to remain entailed on the eldest son descended from J A and his posterity from one generation to another for ever: but in case of death or want of issue from the said J A," then over: Shadwell, V.-C., read the will as if it had been "in case of death and failure of issue," so as to agree with the general intent collected from the context, that all the descendants of J A were to take in succession.

(*q*) *Grimshawe* v. *Pickup*, 9 Sim. 591; and *Miles* v. *Dyer*, 5 Sim. 435, 8 Sim. 330, *ante*, p. 578; *Law* v. *Thorp*, 25 L. J. Ch. 75; 1 Jur. (N.S.) 1082; *Johnson* v. *Simcock*, 6 H. & N. 6, 7 *ib.* 344; *Bentley* v. *Meech*, 25 Bea. 197; *Hawkins* v. *Hawkins*, 7 Sim. 173.

(*r*) *Hawksworth* v. *Hawksworth*, 27 Bea. 1.

(*s*) See *Malden* v. *Maine*, 2 Jur. (N.S.) 206.

(*t*) 4 Burr. 2052; see also *Nicholls* v. *Tolley*, 2 Vern. 388.

(*u*) *Monkhouse* v. *Monkhouse*, 3 Sim. 119; see also *Hawkes* v. *Baldwin*, 9 Sim. 355.

Re Crutchley.

In *Re Crutchley* (*x*) the testator gave freeholds to S subject to the condition that in the event of S dying intestate or childless or under the age of twenty-one (but not otherwise) the same should become the property of M. S attained twenty-one, and died a spinster and intestate. Parker, J., held that a gift over in the event of the first absolute taker dying intestate and childless was void for repugnancy; that the first or the second "or" must be read as "and" and that on this construction S took absolutely, and the gift over failed.

Gift to several objects alternatively.

Mr. Jarman continues (*y*): "Where there is a gift to two objects or classes of objects alternatively, the ambiguous use of the disjunctive 'or' occasions much perplexity. Sometimes, as we have seen, the gift has been held to be void for uncertainty (*z*); but more frequently, in such cases, the word has been changed into *and*. As in *Richardson* v. *Spraag* (*a*), where a testatrix bequeathed money in trust for such of her daughters *or* daughters' children as should be living at her son's death—it was held, that the children, as well of the living as of the deceased daughters, came in for their shares, the word 'or' being read *and*.

Gift to A *or* his children, read *and*.

"So, in *Eccard* v. *Brooke* (*b*), where the bequest was to L for his life, and after his decease to the nephews and nieces who should be then living, as well on the side of the testatrix's late husband as of her own, to wit, A *or* her children, and B *or* his children, and C *or* his children, and D *or* his children, and E *or* her children, share and share alike. Of these five persons four died in the lifetime of L, three without issue and one leaving two children. The other was living and had no child. Sir L. Kenyon, M.R., was of opinion that the word 'or' must be considered as if it had been *and*, for that otherwise he must either adopt the argument that it meant to substitute the children of each nephew and niece who should happen to die, in the room of their father or mother, for which he saw no sufficient ground, or he must say that the clause was so uncertain that he could give it to none. He held that the two children of the deceased niece and the surviving niece took in equal thirds; but that, if the latter had had any children living, they would have taken equally with her.

Gift to A *or* his issue.

"Again, in *Horridge* v. *Ferguson* (*c*), where the testatrix directed the residue of her property to be divided among such of the children of five persons (naming them) as should be born in

(*x*) [1912] 2 Ch. 335.
(*y*) First edition, p. 451.
(*z*) *Ante*, p. 451.
(*a*) 1 P. W. 434.
(*b*) 2 Cox, 213.
(*c*) Jac. 583. See *Parkin* v. *Knight*, 15 Sim. 83.

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lawful wedlock and living at her decease, *or* the issue of such of them as should be married—Sir T. Plumer, M.R., considered, that, in order to make sense of the passage, ' or ' might be construed *and*. All the children and grandchildren, therefore, took equally."

"Or" read "and" to prevent uncertainty.

And in *Maude* v. *Maude* (*d*), where a testator bequeathed a sum of money to his four sons A, B, C, and D in trust for another son E during his life, and after the death of E without children upon trust to divide the money equally amongst the testator's said sons A, B, C, and D, or to such other of his sons as should afterwards be, in succession, trustees for E under the proviso thereinafter contained, Romilly, M.R., held that "or" must be read "and": otherwise, if two of the four had died, and two others had under the proviso become trustees in their place, and then E had died without issue, would the two original or the two new trustees take the fund? If they did not all take, one class must be excluded.

In *Re Delmar Charitable Trust* (*e*) the income of certain property was given to the P. A. Society "or some one or more kindred institutions"; it was held that the gift was in favour of the P. A. Society and such one or more kindred institutions as the Court might by scheme select.

Grammatical construction of "or."

In *Solly* v. *Solly* (*f*) there was a gift "to each of the children, grandchildren, or other direct descendants of A," and it was held that all the descendants of A were entitled. Wood, V.-C., said that this was the grammatical meaning of the gift, and that it was not a question whether the word "or" should be read conjunctively or not.

To A *or* his heirs.

Mr. Jarman continues (*g*): "'Or,' too, has often been changed into *and* where interposed between the name of the devisee and words of limitation introduced into the devise, as in the case of a devise of real estate to A *or* his heirs, or to A *or* the heirs of his body (*h*). Whether the same construction would

(*d*) 22 Bea. 290.

(*e*) [1897] 2 Ch. 163. The expression attributed to Stirling, J., that the word "or" imported "not a substitutional but an alternative gift" seems to have been used *per incuriam*, for "alternative" implies mutual exclusion: see *post*, p. 1283.

(*f*) 5 Jur. (N.S.) 36.

(*g*) First edition, p. 452.

(*h*) *Read* v. *Snell*, 2 Atk. 642; *Wright* v. *Wright*, 1 Ves. Sen. 409; *Harris* v. *Davis*, 1 Coll. 416; *Greenway* v. *Greenway*, 2 D. F. & J. 128; *Adshead* v. *Willetts*, 29 Bea. 358. So in the case of a devise to A *or* his issue, where "issue" has been taken to be a word of limitation: *Parkin* v. *Knight*, 15 Sim. 83; but of course not where substitution, and not succession, is clearly intended, see *Speakman* v. *Speakman*, 8 Hare, 180; *Holland* v. *Wood*, L. R. 11 Eq. 91; *Burt* v. *Hellyar*, L. R. 14 Eq. 160. It was decided in *Re Whitehead*, [1920] 1 Ch. 298, that a devise to A or his heirs since the Wills Act will be construed as substitutional, so as to prevent a lapse in the event

be applied to bequests of personalty to A *or* his executors or administrators is not quite clear, for in such a case, as the words of limitation are not necessary to confer the absolute interest (a difference, however, which the new law extinguishes), there may seem to be more reason for contending that they are inserted *diverso intuitu*. The strong tendency of the modern cases certainly is to consider the word 'or' as introducing a substituted gift in the event of the first legatee dying in the testator's lifetime: in other words, as inserted, in prospect of, and with a view to guard against, the failure of the gift by lapse" (*i*).

"Or" read as introducing a substituted gift.

But if the gift be to the specified persons "or their heirs or assigns," it is clear that the words are words of limitation only; for the power of assigning implies an absolute and indefeasible interest (*k*).

Gift to "assigns" implies an absolute interest.

And where there was a gift to four persons in succession for their lives, with an ultimate gift on the death of the survivor to "the heirs and assigns" of the survivor, the Court refused to read "and" as "or," the plain construction of the ultimate gift being to the heir of the survivor as *persona designata* (*l*).

It sometimes happens that the word "or" has the effect of adding a divesting clause; as where the gift is to A, B, and C, "or such of them as shall be living" at a future time: this gives each of them a vested interest, subject to be divested in the event of his dying before the time, and of the others (or one of them) surviving that time (*m*).

"Or" introducing divesting clause.

The case of a simple gift in the alternative to two individuals (as a gift to "A or B") is more difficult, and if there is nothing in the will or in the surrounding circumstances to show what the testator meant, such a gift appears to be void for uncertainty (*n*).

Gift to "A or B."

Here we may distinguish those cases where, under a power to appoint in favour of A "or" B (A and B being either classes or individuals), a gift in default of appointment is implied between A and B (*o*). This is an apparent but not a real change of "or"

Power to appoint to A *or* B. Implied gift to A and B in default.

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of A predeceasing the testator. See Hawkins on Wills, 3rd ed., pp. 219, 220; *Re Ibbetson*, 88 L. T. 461, and *post*, p. 1288.

(*i*) This sentence is quoted by Eve, J., in *Re Clerke*, [1915] 2 Ch., at p. 306. Mr. Jarman's examination of the authorities bearing on this subject has been transferred to Chap. XXXVI, *post*, p. 1287.

(*k*) *Re Walton's Estate*, 8 D. M. & G. 173; *Re Hopkins' Trust*, 2 H. & M. 411; *Leach* v. *Leach*, 35 Bea. 185; *Re Masterson*, [1902] W. N. 192; *ante*, p. 401.

(*l*) *Milman* v. *Lane*, [1901] 2 K. B. 745. See *Quested* v. *Michell*, 24 L. J. Ch. 722 and other cases cited *post*, p. 767.

(*m*) *Sturgess* v. *Pearson*, 4 Mad. 411; *Penny* v. *Commr. for Railways*, [1900] A. C. 628, *post*, p. 1340.

(*n*) See *ante*, p. 451.

(*o*) *Brown* v. *Higgs*, 4 Ves. 708, 5 Ves. 495, 8 Ves. 561; *Longmore* v. *Broom*, 7 Ves. 124; *Burrough* v. *Philcox*, 5 My. & Cr. 72; *White's Trust*, Joh. 656; *Penny* v. *Turner*, 15 Sim. 368, 2 Phil. 493, overruling *Jones* v. *Torin*, 6 Sim. 255.

into " and "; the true reason that A and B both take being that both are objects of the power, and no selection having been made by the person empowered to select, the Court divides the subject of gift equally between the objects of the power (*p*). Again, a gift to A for life, and after his death to a class of persons " or the issue of such of them as shall then be dead " (*q*), or to A for life, and after his death to such of a class as shall be then living " or their next-of-kin " (or " heirs "), will generally be construed to mean such of the class as shall be living at the death of the tenant for life, and the issue or next-of-kin (or heirs) of such as shall then be dead (*r*).

As to turning " and " into " or."

The word " and," too, is sometimes construed " or." This change (being the converse of that which is exemplified by the preceding cases, but, like it, generally made to favour the vesting of a legacy, and not to divest it (*s*)) may be called for by the general frame and context of the will, as in *Jackson* v. *Jackson* (*t*), where a testator bequeathed a leasehold house to his wife for her life; " and after her death, if my son R shall be living, then to him " for his life, " but if he should be living at the time of the death of my wife, and shall then or hereafter have any issue male of his body, then all the right therein to go to R; but if R; should die in the life of my wife without leaving issue male," then over : Lord Hardwicke thought it clear, on the face of the will, that the testator did not intend the property to go over unless R died in the lifetime of the wife without issue male; and to effect this end he construed " and " as " or "; so that, although R died in the lifetime of the wife, yet, as he left issue male, he took the estate absolutely.

So, in *Hetherington* v. *Oakman* (*u*), where the ultimate

(*p*) 7 Ves. 128; 2 Phil. 495. The power is exclusive, *ib.* and *Re Veale's Trusts*, 4 Ch. D. 61; 5 Ch. D. 622. And see *McGibbon* v. *Abbott*, 10 A. C. 653 (Canadian case in P. C.).

(*q*) *Shand* v. *Kidd*, 19 Bea. 310.

(*r*) *King* v. *Cleaveland*, 26 Bea. 26; 4 De G. & J. 477; *Re Philps' Will*, L. R. 7 Eq. 151; *Burt* v. *Hellyar*, L. R. 14 Eq. 160; *Wingfield* v. *Wingfield*, 9 Ch. D. 658. But in *Lachlan* v. *Reynolds*, 9 Hare, 796, " their " was strictly construed as referring to the " children then living," so that " heirs " must if anything necessarily be deemed a word of limitation, and *or* be read *and*, which was confirmed by another gift to the children living at another period *and* their heirs.

(*s*) See *per* Wood, V.-C., *Day* v. *Day*, Kay, 708; *Maddison* v. *Chapman*, 3 De G. & J. 536.

(*t*) 1 Ves. Sen. 217. This is an analogous case to *Grant* v. *Dyer*, 2 Dow. 87, *ante*, p. 583. The L.C. added, that if R had survived the wife, but had no issue then living, he would have taken only a life interest, and that by the express words of the gift; so that it seems the Court, in effect, struck out of the clause introducing the bequest over the words " if he should be living at the time of my wife's death."

(*u*) 2 Y. & C. C. C. 299; see *Hawes* v. *Hawes*, 1 Ves. Sen. 13; 1 Wils. 165; *Stubbs* v. *Sargon*, 2 Kee. 255; *Stapleton* v. *Stapleton*, 2 Sim. (N.S.) 212; *Davidson* v. *Rook*, 22 Bea. 206. *Malmesbury* v. *Malmesbury*, 31 Bea. 407, where the change was not made, was the case of a deed.

bequest after the failure of certain prior interests under the will, was to the testator's nephews and nieces and such of them as should be then living, it was impossible, upon any reasonable construction, to read the word "and" otherwise than as "or." So if a testator give a power to be exercised by A and his heirs and assigns, the words as they stand requiring the heirs to join with the ancestor, would prevent a sale being ever made at all; for *Nemo est hæres viventis*: "and" must therefore be read disjunctively (*x*).

And where a testator made a bequest after a specified period "to such of his grandchildren and their issue as should then stand to him in equal degree of consanguinity, and their heirs as tenants in common," the word "and" was read "or," it being impossible that grandchildren and their issue could be in equal degree of consanguinity to the testator (*y*).

There are cases in which a gift to certain persons "and" their children, descendants, etc., has been read as a gift to them "or" their children, etc., so as to make the gift to the children substitutional (*z*).

The change of "and" into "or" may be called for, as Mr. Jarman points out (*a*), not only "by the general frame and context of the will," as in the cases above mentioned, but also "by the circumstance that a literal adherence to the testator's language occasions that one member of his apparently copulative sentence is included in, and, therefore, reduced to silence by another. On this ground, probably, the construction has prevailed in several cases where an ulterior gift was to take effect on the death of the first devisee unmarried *and* without issue."

Unmarried *and* without issue.

Thus, in *Wilson* v. *Bayly* (*b*), where a testator devised certain leasehold lands to trustees, in trust for his son John until his marriage, and then to make provision for his wife; and if John should have any issue, then to assign the premises to him, to enable him to make provision for his children; and if John should happen to have no issue lawfully begotten, in trust for testator's son Mark in like manner; it being his intention that, if his son should die before he was married, or, if he were married, and should have no issue lawfully begotten, then the lands should be enjoyed by Mark; and in case both his sons, Mark and John, should "happen to die unmarried, and neither of them should have any issue lawfully begotten," then over. Mark died un-

(*x*) *Jones* v. *Price*, 11 Sim. 557; see acc. Sugd. Pow. 844, pl. 24 (8th ed.).
(*y*) *Maynard* v. *Wright*, 26 Bea. 285.
(*z*) *Burrell* v. *Baskerfield*, 11 Bea. 525; *Tucker* v. *Billing*, 2 Jur. (N.S.) 483. But see *Penny* v. *Turner*, 2 Ph. 493.
(*a*) First edition, p. 455.
(*b*) 3 Br. P. C. Toml. 195.

married. John married, but had no issue. The devise over was held to have taken effect, the clause being construed in the disjunctive.

So, in *Hepworth* v. *Taylor* (*c*), a bequest over, in case the legatees died unmarried "and" without issue, was held to take effect on the death of one married but without leaving issue.

Again, in *Maberley* v. *Strode* (*d*), where the bequest was in trust for the testator's son A for life, and after his decease for his children; but in case he should die unmarried "and" without issue, or having issue, they should all die, if sons, before they attained twenty-one, or, if daughters, before they attained twenty-one or were married, then over. A married but died without issue; and Sir R. P. Arden, M.R., held that the gift over took effect.

"Without being married and having children."

So, in *Bell* v. *Phyn* (*e*), where a residue was bequeathed equally between the testator's three children, and in case of the death of any of his children, "without being married and having children," the share of the child so dying to be divided between the surviving children: Sir W. Grant, M.R., on the authority of the last case, held, that the word "and" was to be construed "or," for as, legally speaking, there could be no children without a marriage, it was almost necessary, in order to give effect to all the words, to construe the copulative as disjunctive. However, the daughter whose share was in question having married and also had a child, it was unnecessary to decide the point.

And in *Mackenzie* v. *King* (*f*), where real and personal property was given in trust for A for life, and after her death for her children; but in the event of her not intermarrying nor having children, then the same property to be subject to her disposal by will or otherwise; Sir K. Bruce, V.-C., held that "nor" (the component parts of which are "and not") must be read "or not," and that the fund was at A's disposal, in the event either of her remaining single or marrying and not having a child.

Mr. Jarman continues (*g*): "But though, by construing the contingency of dying unmarried and without issue copulatively, the latter member of the sentence is rendered inoperative, (since the fact of being unmarried includes the not having or leaving issue, which always means *lawful* issue), yet, on the other hand, the disjunctive construction reduces to silence the word 'unmarried'; for if the condition upon which the first taker retains the estate is his marrying and having issue, or, in other words,

(*c*) 1 Cox, 112. See also *Long* v. *Lane*, 17 L. R. Ir. 11.
(*d*) 3 Ves. 450.
(*e*) 7 Ves. 453.
(*f*) 17 L. J. Ch. 448.
(*g*) First edition, p. 456.

if the estate is to go over on the non-happening of *either* of these events, then, as the having issue includes the event of marriage, the result of the two events, placed disjunctively, is precisely the same as if the contingency of having issue stood alone. In these cases, it will be observed, the disjunctive construction can never operate to let in the devisee over to the exclusion of the children or issue of the first taker, as in the class of cases before noticed; which accounts for the seeming anomaly of torturing the words in both instances to produce a contrary effect." But since *Grey* v. *Pearson* (*h*) the cases last noticed have lost much of their weight as authorities for applying to any given case the rule which would change "and" into "or" in order to prevent one member of a compound sentence being rendered inoperative. Though it be a canon of construction that effect is if possible to be given to every word used, it is one which must bend to circumstances (*i*); and where the result of changing "and" into "or" would be only to render one member of the sentence inoperative instead of the other, the change certainly ought not to be made (*k*). It was made in the Irish case of *Long* v. *Lane* (*l*), but with this exception, it does not appear to have been made in any case since *Grey* v. *Pearson*; which indeed was treated by Romilly, M.R. (*m*), as having overruled *Bell* v. *Phyn* and *Maberley* v. *Strode*, as well as *Brownsword* v. *Edwards*. The decision in *Doe*

(*h*) 6 H. L. C. 61, *ante*, p. 582.

(*i*) *Per* Lord Cranworth in *Clarke* v. *Colls*, 9 H. L. C. 612; and in *Earle* v. *Barker*, 11 H. L. C. 280, Lords Cranworth and Chelmsford (agreeing with Romilly, M.R., 33 Bea. 353) preferred construing an ambiguous clause, forming one member of a copulative sentence, in a way that rendered it inoperative, to changing "and" into "or." Lord Westbury would have preferred the latter course; but both led to the same decision.

(*k*) *Re Kirkbride's Trusts*, L. R. 2 Eq. 400.

(*l*) 17 L. R. Ir. 11. In that case the gift over was to take effect in the event of the devisee dying unmarried and without legal issue; he had a power to charge the lands with a jointure, and this necessarily excluded the conjunctive construction.

(*m*) In *Seccombe* v. *Edwards*, 28 Bea. 440, treated as rightly decided in *Steen* v. *Steen*, Ir. R. 6 C. L. 8; and see *Re Sanders' Trusts*, L. R. 1 Eq. 680, *post*, p. 593. "The cases of *Maberley* v. *Strode* and *Bell* v. *Phyn* were much canvassed in the case of *Dillon* v. *Harris*, 4 Bligh. (N.S.) 321, where Lord Brougham seemed very reluctant to consider them as general authorities for turning into *or* the word 'and,' occurring in a limitation over, in case of the prior legatee dying unmarried and without leaving lawful issue; his Lordship's opinion being that Sir W. Grant, in deciding *Bell* v. *Phyn* upon the authority of *Maberley* v. *Strode*, did not sufficiently advert to the special circumstances of the latter case. The case in the House of Lords, however, did not raise the point, as the prior bequest was to take effect upon the legatee marrying with consent, and the bequest over was in case he should *so* die unmarried and without leaving lawful issue; which Lord Brougham thought referred to such a marriage as had been previously referred to, namely, marriage with consent; and as the legatee had married without consent and had left no issue (so that, even according to the disjunctive construction, the bequest over failed), the question did not arise." (Note by Mr. Jarman (1st ed.), p. 457.)

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d. *Usher* v. *Jessep* (*n*), where the Court refused to change " and " into " or," has been already referred to.

Grey v. *Pearson* and *Abbott* v. *Middleton.*

The decision in *Grey* v. *Pearson* is sometimes referred to as if the rule that words are *prima facie* to be taken in their ordinary and grammatical sense was new, and as if a more strict and literal construction was now generally required than had previously obtained. But the rule is an old one (*o*). The application of it in that particular case was strict, and within its particular scope the decision is of course conclusive : but that no new principle of general application has been introduced by it is shown by the subsequent decision of the House of Lords in *Abbott* v. *Middleton* (*p*), and by other cases noticed above (*q*).

Whether " unmarried " means not having been married, or not being married at the time.

" The word *unmarried*," as Mr. Jarman points out (*r*), " means either never having been married, or, not having a husband or wife at the time. The former is its ordinary signification; and it was considered as so used in the [cases stated above (*s*)], where, however, the effect of such construction was to render the word inoperative. But the sound rule in such cases would seem to be, to construe the expression as used in the latter, being its less accustomed sense (*t*), which has a twofold advantage, that it removes the necessity of changing the particle ' and ' to ' or ' and gives effect to all the testator's words."

" Unmarried " construed to mean not having husband or wife at the time.

As illustrations of this mode of construction, Mr. Jarman cites two cases, *Doe* v. *Cooke* and *Doe* v. *Rawding*. In *Doe* v. *Cooke* (*u*), the bequest was to B and his assigns (after the death or marriage of A) for his life, after his decease then to the child or children of B by any future wife, his, her, or their executors, administrators and assigns; but the testator declared his will to be upon this further condition, that in case B should die an infant unmarried and without issue, then over to C and his children. B attained his majority, and died, leaving a widow, but without having had issue; and it was held, that in these events the gift over failed. Lord Ellenborough said : " The most rational construction we can give this will is, to construe it as

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(*n*) 12 East, 288, *ante*, p. 581.

(*o*) See *ante*, p. 466, *post*, p. 2133.

(*p*) 7 H. L. C. 68, *ante*, p. 558, where Lords Cranworth and Wensleydale were again opposed to Lord St. Leonards, but were not on this occasion in a majority.

(*q*) Pp. 565 *seq.*

(*r*) First edition, p. 457.

(*s*) *Wilson* v. *Bayly*, *Hepworth* v. *Taylor*, *Maberley* v. *Strode*, and *Bell* v. *Phyn*.

(*t*) " The word ' unmarried ' is used in this sense in the stat. 3 W. & M. c. 11, s. 7, which provides, that, ' if any *unmarried* person, not having a child or children, shall be lawfully hired,' &c.; as no one, *not having been* married, can have children in the legal sense." (Note by Mr. Jarman.) The effect of the word " unmarried " is discussed *post*, p. 1251.

(*u*) 7 East, 269.

Lord Hardwicke did the devise in *Framlingham* v. *Brand* (*x*), as *one contingency*, namely, B's dying an infant, attended with *two qualifications*, *viz.*, his dying without leaving a wife surviving him, or dying without children. Had he left a wife, and had died an infant, and no children, the testator might have intended that, in such event, the widow should be benefited by taking her share under the Statute of Distribution with the next-of-kin, or that B should be able to make a testamentary disposition in her favour; meaning, also, that if he left children, they should have the estate in preference to the wife; and that if he left neither wife nor children at his death during his minority, C and his children should have the estate; but that if he arrived at the age of twenty-one he should have a power to dispose of it, though he left neither wife nor children."

In *Doe* v. *Rawding* (*y*) a testator devised his lands to his daughter and any other children he might leave, and to her or their heirs and assigns for ever; but in case his daughter and such other children as aforesaid should die under the age of twenty-one years unmarried and without lawful issue, then to his wife in fee. The daughter died under age and without issue, but leaving a husband surviving; and it was held, on the authority of the last case, that the devise over failed.

"Unmarried" ought to be construed according to the context.

As B in the former case left a wife, and the daughter in the latter case left a husband, surviving, neither of them was "unmarried" in any sense, and it was therefore unnecessary to decide upon the actual meaning of the word. The former case shows the opinion of Lord Ellenborough; but in the latter, Bayley and Holroyd, JJ., seem to have thought that either of the two meanings might be ascribed to it according to the context, and Lord Cottenham was of the same opinion (*z*).

The principle stated by Mr. Jarman has, however, been adopted by the Courts. Thus in *Re Sanders' Trusts* (*a*), where there was a gift over in the event of the primary legatee dying "unmarried and without issue," Wood, V.-C., declined to change "and" into "or," and held that "unmarried" meant "without leaving a widow." The same principle was applied in *Re King* (*b*), *Re Chant* (*c*), and *Re Jones* (*d*).

(*x*) 3 Atk. 390.

(*y*) 2 B. & Ald. 441.

(*z*) *Maugham* v. *Vincent*, 9 L. J. (N.S.) Ch. 329. See *post*, p. 1579, where the cases on the construction of gifts to the persons who would have been the next-of-kin of a married woman "if she had died unmarried" are considered. As to "unmarried" meaning "not married with consent," see *Dillon* v. *Harris*, referred to *ante*, p. 591, n. (*m*).

(*a*) L. R. 1 Eq. 675. See *Carolin* v. *Carolin*, 17 L. R. Ir. 25 n.

(*b*) 62 L. T. 789.

(*c*) [1900] 2 Ch. 345.

(*d*) [1915] 1 Ch. 246.

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"Unmarried" construed to mean "not having been married."

In *Roberts* v. *Bishop of Kilmore* (*e*) a testatrix devised property to her son H, and declared that if he died "unmarried and without issue" it should go over to her two elder sons. The devise was preceded by gifts in favour of such of her daughters as "remained unmarried," where the word "unmarried" clearly meant "spinsters," that is, "not having been married," and it was held by Porter, M.R., that the same construction was to be placed on the expression "unmarried and without issue" as used in the gift over following the devise to H. But this does not seem conclusive, for in the expressions "remaining unmarried" and "dying unmarried" the word "unmarried" does not necessarily mean the same thing (*f*).

A testator may by the context show that he did not use "unmarried" in the sense of "without leaving a widow"; as where he devises land subject to a gift over in the event of the original devisee dying unmarried and without issue, and gives him a power to charge a jointure in favour of his widow (*g*).

If a gift over is to take effect in the event of the legatee "dying before marriage and leaving no issue," no question can arise (*h*). And if a testator expressly gives property to his two daughters, to be vested at the age of twenty-four or marriage, and if they both die under twenty-four and unmarried, then over, the Court will not alter "and" into "or," or give "unmarried" any other than its primary sense of "never having been married" (*i*).

Marriage settlement.

It may be mentioned that in the ultimate trust of a marriage settlement, unless there is something in the context, the expression "without having been married," has its natural meaning (*j*).

"And" not construed "or" where a previous gift would be thereby divested.

It has already been observed that in the majority of cases where "and" has been construed disjunctively, it has been in order to favour the vesting of a legacy, and not in order to defeat a previously vested gift; and generally it will not be so construed where the latter consequence would follow; as, where the bequest is to A for life, remainder to his eldest son (or to his children), with a gift over if A should die under twenty-one and without

(*e*) [1902] 1 Ir. R. 333.

(*f*) Compare the case of *Pratt* v. *Mathew*, 8 D. M. & G. 522, where the word "unmarried" alone was used in two different senses in the same instrument.

(*g*) *Long* v. *Lane*, 17 L. R. Ir. 11.

(*h*) *Seccombe* v. *Edwards*, 28 Bea. 440; *Steen* v. *Steen*, Ir. R. 6 C. L. 8 ("die without marrying and leaving no legal issue").

(*i*) *Gonne* v. *Cook*, 15 W. R. 576.

(*j*) *Boyce* v. *Wasbrough*, [1922] 1 A. C. 425, approving *Re Brydone's Settlement*, [1903] 2 Ch. 84.

issue (or under twenty-one and without children) (*k*). Again in *Day* v. *Day* (*l*), where a testator bequeathed the interest of his residuary personal estate to his wife for life, and after her death to his brother for life, and after the death of the survivor, the capital to A, subject to the payment of £1,000 each to B, C, and D, which the testator gave to them to be paid to such of them at the end of twelve months next after the decease of the survivor of his wife and brother; provided, that if either of the said B, C, and D should die "in the lifetime of my said wife and my said brother" his legacy should lapse. Sir W. P. Wood, V.-C., refused to read "and" as "or," and thereby cause a lapse of B's legacy, who had survived the wife but died before the brother (*m*). And this is independent of *Grey* v. *Pearson*.

"And" read "or" in power to apply fund "for advancement and benefit" of legatee.

Where a will contained a power for the trustees to apply the capital of a fund for the "benefit and advancement in the world" of the person entitled to the income of the fund for life, it was held (*n*) that the word "and" in the clause conferring the power must be read "or," and that the trustees might apply the fund not merely for "advancement" in the strict sense of the term, but for any purpose for the benefit of the legatee.

(*k*) *Malcolm* v. *Malcolm*, 21 Bea. 225; *Key* v. *Key*, 1 Jur. (N.S.) 372. See also *Coates* v. *Hart*, 32 Bea. 349; 3 D. J. & S. 504, 516.

(*l*) Kay, 703. See also *Barker* v. *Young*, 33 Bea. 353; *Re Kirkbride's Trusts*, L. R. 2 Eq. 400; *Reed* v. *Braithwaite*, L. R. 11 Eq. 514; *W*— v. *B*—, 11 Bea. 621.

(*m*) It was held that "die in the lifetime of my said wife and my said brother" meant "die in their joint lifetime": and *Brudnel's Case*, 5 Co. 9, was cited.

(*n*) *Re Brittlebank*, 30 W. R. 99.

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